No. SC83611

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

KENNETH H. THOMPSON

Appellant.

Appeal from the Circuit Court of Dallas County, Missouri
Thirtieth Judicial Circuit
The Honorable Theodore B. Scott, Judge

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from two sentences of death obtained in the Circuit Court of Dallas County. Appellant had been tried and convicted of two counts of murder in the first degree, § 565.020, RSMo 2000, and sentenced to death. On appeal, this Court upheld the finding of guilt of both counts of murder in the first degree, but reversed his sentences of death and remanded for a new sentencing hearing. State v. Thompson, 985 S.W.2d 779 (Mo.banc 1999). After a new penalty phase trial, appellant was sentenced to death on both counts. Therefore, jurisdiction lies in the Supreme Court of Missouri. Mo.Const. Art. V, § 3 (as amended 1982).

STATEMENT OF FACTS

Appellant, Kenneth H. Thompson, was charged by amended information, as a prior offender, with two counts of murder in the first degree, § 565.020, RSMo 2000 (L.F. 24-25).[1] On October 15-23, 1997, the cause went to trial before a jury in the Circuit Court of Dallas County, the Honorable Theodore B. Scott presiding (1st Tr. 209, 1471).

In State v. Thompson, 985 S.W.2d 779 (Mo.banc 1999), this Court set out the evidence adduced in the guilt phase as follows:

> In July 1996, defendant and his wife, Tracie Thompson, were experiencing marital problems. On August 1, 1996, Tracie's stepfather, Clarence Menning, asked defendant to leave his home. Defendant had been living in the Menning home with his wife and children after a fire had damaged their house.
>
> The next weekend, Tracie arranged for the children to stay with defendant while she traveled out of town. Defendant picked up the children on Friday, August 2 and returned them on Sunday, August 4. At that time, defendant argued with Tracie about her desire for a divorce and her relationship with another man. Defendant eventually left for his mother's home. Tracie returned to the Menning home with her children.

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[1] Respondent cites to the record as follows: transcript from first trial (1st Tr.), legal file from first trial (1st L.F.), transcript from penalty phase retrial (Tr.), legal file from penalty phase retrial (L.F.).

As the evening of August 4 became the morning of August 5, defendant left his mother's home. Defendant drove to the Menning home and remained in his parked van across the road for a while. Around 2:30 in the morning, defendant cut the telephone wires running to the Menning home and entered the home with a gun and some other tools, including a splitting maul handle.

Inside, defendant checked on his wife and children and found them asleep. He wished to talk with his wife, but did not want to be interrupted by her mother and stepfather. Defendant considered tying the Mennings up with duct tape, but decided against doing so because Mr. Menning was much larger than he was. Defendant struck Mr. Menning in the head at least four times with the maul handle. Mr. Menning died "as a result of multiple blunt impact injuries to the brain." Defendant's attack left Mr. Menning's brain visible. Defendant then struck Mrs. Menning in the head three times. Mrs. Menning died after suffering a fractured skull and brain injuries as a result of defendant's attack. Mrs. Menning also suffered a bruise on her left hand and scrapes and tears on her index finger, suggesting that she attempted to defend herself.

After defendant finished beating the Mennings, he moved to his wife's bedroom. Tracie awoke to find defendant undressed and standing over her, holding a gun. Defendant then jumped onto the bed and straddled Tracie. He ripped off her underwear, pinned her hand against the headboard, and forced her legs apart. Defendant then raped Tracie, despite her resistance and cries for help.

After the rape, defendant forced his wife out of the house and into his van. After Tracie was in the van, defendant pulled up to the Menning home and collected the children, whom he

also placed in the van. At one point, defendant bound his wife's arms and legs with duct tape to keep her from resisting.

As they drove away, Tracie asked defendant to return to the Menning home so that she could check on her parents. Defendant told his wife that he had killed them. Eventually, after Tracie promised not to call the police, defendant drove her and the children to a friend's home at approximately 5:30 that morning. Defendant gave Tracie some clothes he had placed in his van. Tracie told defendant to leave, and he did. Tracie and her friend returned to the Menning home later that morning and discovered the Mennings' bodies.

Meanwhile, defendant had traveled to Sedalia, where he abandoned his van and borrowed a car from his aunt. Then, defendant cashed a check, purchased a suitcase and continued west to Warrensburg where he hoped to catch the train to Kansas City. In route to Warrensburg, defendant took some money from newspaper vending machines using Mr. Menning's keys.

At the Warrensburg train station, defendant telephoned his mother's house. He spoke to family members and the Morgan County sheriff. Eventually, defendant agreed to surrender to the sheriff. He told the sheriff he was in Warrensburg and would stay there until the sheriff arrived. The sheriff traveled to Warrensburg. He met defendant there, arrested him, and informed him of his Miranda rights. The sheriff then called the Johnson County sheriff's department and placed the defendant into its custody. Defendant consented to the Johnson County sheriff's search of his aunt's car and his van. Sergeant Ripley of the Missouri Highway Patrol interviewed defendant. Later, the defendant made a videotaped confession.

In July 1997, defendant escaped from the Benton County jail, where he was awaiting trial. He was caught the same night after fleeing to Jackson County.

State v. Thompson, 985 S.W.2d at 783-84.

At his original trial, the jury recommended a sentence of death. Id. at 784. On appeal, this Court affirmed the verdicts of guilt but reversed the sentences of death and remanded for a new penalty phase. Id. at 792.

At the new penalty phase, in addition to the above evidence about appellant's crimes, the prosecutor presented evidence from two blood spatter experts, who testified that Mrs. Menning's arms and head moved sometime after appellant began his attack, supporting an inference that Mrs. Menning was conscious and tried to defend herself at some point during appellant's attack (Tr. 609-17, 638-39). The prosecutor presented evidence about the details of appellant's escape from jail, and evidence that appellant said he would escape again if he had the opportunity (Tr. 570-77, 735, 752-56). The prosecutor also presented evidence that after appellant's first wife remarried, appellant harassed her new husband by telephoning him and cursing him and calling him names and by following him in his car, and that appellant said he would not contest the adoption of his daughters if he would pay appellant $1,000 (Tr. 746-48). The prosecutor also presented victim impact evidence from Mr. Menning's son, Monty Menning (Tr. 737-43).

Appellant did not take the stand, but presented evidence from several people at Potosi regarding appellant's work history in many different jobs at the prison, his behavior at the prison, and the general strictures put on prisoners (Tr. 805, 847, 872, 878, 935, 944, 955). Appellant called two of his friends, who testified that appellant had been a good husband and father when he lived in South

Dakota (Tr. 893, 902). Appellant also called his mother, who testified about appellant's life from childhood on (Tr. 970-1001).

At the close of the evidence, instructions, and arguments of counsel, the jury left to deliberate (Tr. 1057). After an hour and ten minutes, they sent out a note stating, "We just found out that one of our jurors does not believe in imposing the death penalty" (Tr. 1057, 1060-61, 1065, L.F. 263). Appellant objected to any inquiry about the juror's note, and nearly an hour later, the jury returned a verdict form indicating a sentence of life imprisonment (Tr. 1061, 1064-66). However, when the jury was polled, eleven of the jurors stated that the verdict was not their verdict (Tr. 1067-68). The trial court obtained new verdict forms, and sent the jury back for further deliberations (Tr. 1069-72). After having been out for about twenty-five minutes, the jury returned a verdict stating that they could not agree upon punishment (Tr. 1070-72). When polled, all the jurors agreed that this verdict was their verdict (Tr. 1073-75).

On April 13, 2001, the trial court sentenced appellant to death (Tr. (1079-80). The court found two aggravating circumstances for each count, that the murder was committed while appellant was engaged in another unlawful homicide, and that the murder was committed while appellant was engaged in the perpetration of rape (Tr. 1079-80). At the sentencing hearing on May 9, 2001, the court issued its judgment sentencing appellant to death on each count (Tr. 1082, 1090). This appeal follows.

ARGUMENT

I.

The trial court did not abuse its discretion or plainly err in sending the jury back for further deliberations after eleven jurors stated, upon being polled, that the verdict form returned by the jury was not their verdict, and in accepting the final verdict of the jury because the trial court may not accept an improper verdict in that there was no verdict of life without probation or parole.

For his first point on appeal, appellant claims that the trial court "abused its discretion" in not accepting the initial verdict form returned by the jury, even though eleven of the twelve jurors stated that it was not their verdict (App.Br. 45). Appellant argues that the first "verdict" was proper, that the court had a duty to invade the province of the jury and question them about the particulars of their deliberations, and that the instructions, although perfectly in accord with MAI and statutes, were insufficient guidance for the jury to return a correct verdict after being sent back for further deliberations (App.Br. 45).

1. Facts

During voir dire, the trial court and parties explained that if the jury did not unanimously agree that there was one statutory aggravating circumstance and that the evidence in aggravation of punishment warranted the death penalty, then the jury must sentence appellant to life imprisonment (Tr. 155, 157-61, 171-77). In discussing the process with the venire panel, the parties did not explain the option of returning a verdict stating they could not agree on punishment (*see* Tr. 157-61, 177-81).

Just before closing arguments, the trial court read the instructions to the jury (Tr. 1012). Two

instructions submitted to the jury, Instructions 10 and 15, described how to return a verdict of being unable to agree on punishment (L.F. 250, 257, MAI-CR 3d 313.48A). Instruction 10, the verdict mechanics instruction regarding Count I, read, "If you do unanimously find the matters described in Instructions No. 6 and 7, but are unable to agree upon the punishment, your foreperson will sign the verdict form stating that you are unable to decide or agree upon the punishment." (L.F. 250, Resp.App. A2). Instruction 15 was substantially the same as Instruction 10 except that it referenced Count II (L.F. 257-58, Resp.App. A4-A5). During closing arguments, the prosecutor again explained the process to the jury, but did not discuss the possibility of the jury returning a verdict that they could not agree on punishment (Tr. 1014-15). The jury was given three verdict forms for each count, one for a verdict of life imprisonment, one for a verdict of death, and one for inability to agree upon the punishment (264-71).

The jury left to deliberate at 2:30 p.m. (Tr. 1057). At 3:05 p.m., the jury requested "pictures of victims and crime scene and maul handle," and a dictionary (Tr. 1060, L.F. 261-62). At about 3:40 p.m., the jury sent out a note stating, "We just found out that one of our jurors does not believe in imposing the death penalty" (Tr. 1060-61, 1065, L.F. 263). While the parties were still discussing what to do about the note, at about 4:20 p.m., the jury told the bailiff that they had reached a verdict but needed the "ballots" (Tr. 1060-61). Then the jury gave the bailiff another message that they wanted the court to "wait a couple more minutes" (Tr. 1061-62).

The prosecutor thought the note about the juror not believing in the death penalty was evidence of juror misconduct and wanted to ask the jury about it, but also said that if there was a verdict, "obviously we have to take it and I will be requesting the jury be polled" (Tr. 1062-63). Appellant said

that the note was "ambiguous," and did not want any inquiry to clarify the meaning of the note, even if the jury had reached a verdict, and even if that verdict was that the jury could not decide on punishment (Tr. 1061-63).

At 4:30 p.m., appellant was brought into the courtroom, the situation was explained to him by the trial court and by his attorneys, and appellant waived any inquiry of the jurors regarding the meaning of the note (Tr. 1064-65).

Five minutes later, the jury was brought in (Tr. 1065). The court clerk read the verdicts, which were life imprisonment on each count (Tr. 1066). The prosecutor asked that the jury be polled (Tr. 1067). All of the jurors but one stated that the verdict was **not** their verdict (Tr. 1067-68). The prosecutor stated that there was no verdict in the case, and asked that the jury be told to continue to deliberate (Tr. 1068-69). Appellant did not specifically object, but did state, "I think it's their verdict and their verdict should be accepted," and speculated that the jurors might just be indicating disagreement among themselves (Tr. 1069). The court stated, "No, it either is or is not their verdict," ordered the prosecutor to get clean copies of the verdict forms of life without parole, and said the following to the jury, "Okay, ladies and gentlemen, I would like you to please return to the deliberation room. In just a second or two you will get the instructions back." (Tr. 1069-70). The jury was sent back at 4:40 p.m., and at 4:50 p.m., a clean set of instructions and verdict forms was sent back to the jury (Tr. 1070-72).

At 5:05 p.m., the jury returned, and the foreperson said, "We want to apologize to the Court for the misunderstanding." The clerk read the verdicts, which were that they were unable to decide on punishment (Tr. 1072-73). The prosecutor requested the jury be polled, and all the jurors each agreed

that it was their verdict (Tr. 1073-75). Then the following exchange took place:

> THE COURT: Thank you. Madam foreperson, can you tell me as to why the disparity, the difference? The last one was– I don't want to put words in your mouth, but I have now a second one that you all have acknowledged as your decision. For the record can you tell us–
>
> FOREPERSON COPELAND: Yes, Your honor. We misunderstood as far as unanimously agreeing upon a verdict. What we understood was that if we did not agree on one then we would have to vote the other way. But we were not all in agreement of the other verdict so we misunderstood. And we decided with that misunderstanding that we would, because we could not agree on a decision unanimously, that we would give it to the Court.

(Tr. 1075-76).

Then appellant requested that the jurors be asked about the details of their deliberations, including the voting at each stage of the process, to check and see whether they followed the instructions (Tr. 1076-77). The prosecutor objected to questioning the jurors about the details of their deliberations, and pointed out that the foreperson had already explained that they had just been confused about the forms and the process, and when the jury had returned, she apologized for misreading them (Tr. 1077). The court agreed that further questioning was improper, and accepted the jury's verdicts (Tr. 1077).

2. Standard of review

Appellant's claim that the trial court should have given further instructions to the jury before sending them back for further deliberations is not preserved for review, because he neither asked the court to do this at trial, nor included the claim in his motion for a new trial (*see* Tr. 1068-70, L.F. 305-

308).

The trial court is under a duty not to accept an improper jury verdict. State v. Lashley, 667 S.W.2d 712, 715 (Mo.banc 1984).

The trial court has control over procedures in the courtroom, and its decisions on how to deal with difficulties that may arise are reviewed for an abuse of discretion. *See, e.g.*, State v. Johns, 34 S.W.3d 93, 109 (Mo.banc 2000) (conduct of voir dire is within trial court's discretion); State v. Armentrout, 8 S.W.3d 99, 108 (Mo.banc 1999) (whether to restrain defendant is within trial court's discretion); State v. Deck, 994 S.W.2d 527, 539 (Mo.banc 1998) (trial court has discretion in dealing with emotional outbursts before the jury).

3. Law on imposing a sentence of death

Section 565.030.4, RSMo 2000, sets forth a four-step process for deciding whether to sentence a defendant to death. First, the jury must unanimously find at least one statutory aggravating circumstance beyond a reasonable doubt. Second, the jury must unanimously find that the evidence in aggravation of punishment warrants the imposition of the death penalty. Third, the jury must determine that the evidence in aggravation of punishment outweighs the evidence in mitigation of punishment. Fourth, the jury must decide, under all the circumstances, to sentence the defendant to death. If the jury is not unanimous as to either of the first two steps, the jury must unanimously return a verdict of life imprisonment. Id., *see also* MAI-CR 3d 313.48A. If the jury is not unanimous as to either of the last two steps, the jury must unanimously return a verdict stating the jurors cannot agree on punishment. Section 565.030.4, RSMo 2000, *see also* MAI-CR 3d 313.48A.

4. The trial court did not abuse its discretion in sending the jurors back for further

deliberations when they indicated they had not reached a unanimous verdict

Appellant first argues that the trial court was obliged to accept the initial verdict form returned by the jury, in spite of the fact that eleven of the twelve jurors stated that it was not their verdict (App.Br. 50).

A. It is well-established that, if the jury poll reveals that the verdict is not unanimous, the jury should be sent back for further deliberations to resolve the ambiguity

Supreme Court Rule 29.01(d) describes the correct process to follow upon the jury's return of a verdict:

> (d) Poll of Jury. When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged.

Thus, if the jury is polled, and the jury is not unanimous, the trial court may either discharge the jury entirely, or may send the jury back for further deliberations.

It is well-established that it is proper for a trial court to send a jury back for further deliberations when a jury gives an improper verdict. In State v. Lashley, 667 S.W.2d at 715, the jury's finding on the statutory aggravating circumstances was improper. The trial court told the jury that its verdict was not in proper form, and directed them to retire and read the instructions. Id. After doing so, the jury returned, in proper form, a verdict of death. Id. On appeal, the defendant claimed that the initial verdict form entitled him to a sentence of life without probation or parole. Id. This Court held:

> The law is clear that when a jury returns a verdict in improper form, it is the duty of the trial court to refuse to accept the same and require further deliberations until a verdict in proper form is returned. The jury's verdict is not binding until it is accepted by the court and the jury discharged. Consequently, there is no merit in defendant's claim that he was "acquitted" of the statutory aggravating circumstance by the jury's improperly worded verdict form.

Id. (citations omitted).

Further, in State v. Peters, 855 S.W.2d 345, 347 (Mo.banc 1993), the jury's initial verdict form was a conviction of armed criminal action and an acquittal of the assault charge upon which it was based. The trial court refused to accept the verdict, told the jury that it had not followed the court's instructions, and said it should retire and read the instructions. Id. The next morning, the jury returned with guilty verdicts on both the armed criminal action and assault charges. Id. On appeal, the defendant claimed that he was entitled to have the jury's acquittal of the assault charge enforced, and that he was entitled to an acquittal of the armed criminal action charge, also. Id. This Court held that the initial verdict forms returned by the jury were improper because they had given two inconsistent verdicts, and that the trial court "acted properly in sending the matter back to the jury for further consideration." Id. at 348. This Court stated that where there is a problem in the jury's verdict, the jury should be allowed to return and resolve the problem wherever possible: "Trial judges are encouraged to make every effort to salvage an improper verdict by calling the jurors' attention to their mistake in failing to follow the jury instructions and giving them an opportunity to correct the mistake. The trial judge did exactly that." Id. at 349.

Cases in the Court of Appeals similarly hold that where the jury's verdict is improper, the trial

court should send the jury back for further deliberations. *See* State v. Griffin, 28 S.W.3d 480, 482 (Mo.App. E.D. 2000) (verdicts of both acquittal and conviction on same Count, trial court properly sent jury back to deliberate further, citing Peters that a jury's attempt to return a verdict that is not accepted by the trial judge is not a verdict); State v. Barnett, 16 S.W.3d 699, 705 (Mo.App. S.D. 2000) (when jury polled, verdict was not unanimous; trial court properly told them to deliberate further and return with a unanimous verdict); State v. Zimmerman, 941 S.W.2d 821, 824-25 (Mo.App. W.D. 1997) (jury returned inconsistent verdicts; trial court's duty was to refuse to accept the verdict and require further deliberations until a verdict was reached; ambiguities should be resolved through further deliberation). In fact, cases from states all over the country recognize that where a verdict is ambiguous or otherwise improper, the trial court has the power to refuse to accept the verdict and order the jury to return for further deliberations. New Mexico v. Apodaca, 940 P.2d 478, 483-84 (N.M. 1997) (citing cases from numerous other states). "When there is uncertainty as to the actual intent of the jury, the power of the court in a criminal case to return them to their room to render a clear and unambiguous verdict is, in this country, recognized as indispensable to an orderly and impartial administration of justice." Id. at 483.

In the case at bar, there is no question that eleven of the twelve jurors, when polled, stated that the verdict of life without probation or parole was not their verdict (Tr. 1067-68). Thus, under Rule 29.01(d) and well-established case law, it was the trial court's duty to refuse to accept the jury's verdict and order them to return to the jury room for further deliberations. This is precisely what the trial court did. Therefore, there is no merit to appellant's claim that the trial court abused its discretion in refusing to accept the jury's initial verdict form.

B. It cannot be presumed that the jury initially followed the court's instructions when the polling of the jury revealed that the jury did not follow the court's instructions

Appellant argues that, because it is presumed that the jury follows the court's instructions, it must be presumed in this case that the jury's initial verdict form was a proper, unanimous verdict (App.Br. 51-53). Appellant claims that if the jurors followed the instructions, and if the initial verdict form was valid, then the jurors must have only reached the second step in the process of their deliberations (App.Br. 53, 55).

Appellant's argument ignores the fact that the initial verdict form was not a valid verdict because eleven of the twelve jurors stated that the verdict of life imprisonment was not their verdict. The jurors were instructed that if one of them did not find that the circumstances in aggravation of punishment warranted the death penalty, then the verdict for all of the jurors must be life imprisonment. (L.F. 247, *see* § 565.030.4(2), RSMo 2000). The jury was also instructed that if they could not agree on punishment, there was another verdict form to return (L.F. 250). However, when the jurors were polled, eleven of them stated that the verdict of life imprisonment was not their verdict (Tr. 1067-68). Thus, they could not have properly followed all the instructions; if the jurors had not agreed that the evidence in aggravation of punishment warranted the death penalty, then they all had to agree that the verdict of life imprisonment was their verdict; if they did not agree at a later stage, then they should have returned a different verdict form. Because the jury poll revealed that the jury had not followed all the court's instructions, it cannot be presumed that the jury did follow all the court's instructions. At best, the "verdict" was ambiguous. As shown above, the course taken by the trial court, to refuse to accept

this ambiguous "verdict" and to return the jury to their room for further deliberations to resolve the ambiguity, was the proper course.

C. Appellant's attempt to impeach the verdict with an affidavit from a juror is highly improper, and the affidavit must be disregarded

After the jury sent out a note stating, "We just found out that one of our jurors does not believe in imposing the death penalty," the prosecutor asked to question the jurors based on this evidence of juror misconduct; i.e., that one of the jurors actually did not believe in imposing the death penalty, and had thus lied during voir dire in order to get on the jury and prevent it from assessing a verdict of death (Tr. 1062). Appellant objected to any inquiry about the note, and preferred to take whatever verdict the jury returned, without further question (Tr. 1061-63). No answer was made to the jury's note, and forty minutes later, they announced that they had reached a verdict and asked for the "ballots," but then said that they needed more time (Tr. 1060-62).

As explained above, the jury's initial verdict form was no verdict at all, because only one juror, George Meyer, stated that it was his verdict (Tr. 1067-68). The jury's second verdict was a proper, unanimous verdict (Tr. 1073-75).

After the trial was over, appellant obtained an affidavit from Mr. Meyer, which affidavit stated that the jury did not follow the instructions in reaching their verdict (L.F. 351-52). The prosecutor objected to the introduction of the affidavit into evidence, and the trial court sustained the objection (Tr. 1083, 1087). Appellant asked to submit a copy of the affidavit as an offer of proof as to what Mr. Meyer would say if questioned (Tr. 1086-87). The court denied this request (Tr. 1087).

Thus, before the jury rendered a verdict, appellant prevented any inquiry into whether Mr.

Meyer was guilty of juror misconduct of lying under oath, and then, once the verdict had been accepted, he obtained an affidavit from Mr. Meyer in an attempt to impeach the jury's only verdict. Appellant's attempt to impeach the verdict with an affidavit from a juror was improper.

For over a century, it has been the well settled law in Missouri that jurors speak through their verdicts, and may not impeach the verdict with oral or written testimony of any thought processes, partiality, or misconduct that transpired inside or outside of the jury room. *See* State v. Johnson, 968 S.W.2d 123, 134 (Mo.banc 1998) ("The law is clear: jurors may not impeach the verdict with testimony '"of any partiality or misconduct that transpired [in the jury room], nor speak of the motives which induced or operated to produce the verdict."'"); State v. Amrine, 785 S.W.2d 531, 535-36 (Mo.banc 1990) (trial court properly refused to consider juror's affidavit that improper argument influenced deliberations; juror may not impeach verdict after it is rendered); State v. Babb, 680 S.W.2d 150, 152 (Mo.banc 1984); State v. Smith, 298 S.W.2d 354, 356 (Mo. 1957) (affidavit of juror stating juror had voted for acquittal throughout the deliberations would not be considered by court; if juror disagreed with verdict, juror should have stated so before verdict was recorded, "law is well settled that traverse jurors, by oral testimony or by affidavit, may not impeach their verdict."); State v. Stogsdill, 324 Mo. 105, 129-30, 23 S.W.2d 22, 31 (Mo. 1929) (affidavits from five jurors describing juror misconduct were attached to motion for new trial, this Court held, "The jurors' affidavits were by the court stricken from the record, and properly so, and cannot be considered. A juror cannot be heard to impeach his own verdict."); State v. Underwood, 57 Mo. 40, 52 (Mo. 1874) (although jurors may testify to support their verdict, "The rule is perfectly settled, that jurors speak through their verdict, and

they cannot be allowed to violate the secrets of the jury room, and tell of any partiality or misconduct that transpired there, nor speak of the motives which induced or operated to produce the verdict."); State v. Garrison, 943 S.W.2d 847, 850 (Mo.App. E.D. 1997) (defendant attached affidavit of juror attached to his motion for new trial, affidavit alleged that jury misunderstood court's instruction; held that defendant improperly relied on affidavit because it could not be used to impeach the verdict).

There are important policy considerations in support of this rule; not just to preserve the finality of verdicts and prevent harassment of jurors, but also to make sure that jurors are free to fully discuss the case during deliberations, without fear that they will be called to testify about anything and everything discussed there. As the United States Supreme Court stated in McDonald v. Pless, 238 U.S. 264, 267-68, 35 S.Ct. 783, 784, 59 L.Ed. 1300 (1915):

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation -- to the destruction of all frankness and freedom of discussion and conference.

See also Tanner v. U.S., 484 U.S. 107, 120, 107 S.Ct. 2739, 2747, 97 L.Ed.2d 90 (1987) (holding juror affidavit claiming jurors used drugs during trial was incompetent to impeach verdict, and stating:

"There is little doubt that postverdict investigation into juror misconduct would in some instances lead to the invalidation of verdicts reached after irresponsible or improper juror behavior. It is not at all clear, however, that the jury system could survive such efforts to perfect it.").

Accordingly, there is no merit to appellant's claim that Mr. Meyer's affidavit may be considered in determining whether the jury's verdict was proper. Mr. Meyer's affidavit attempts to discredit the jury's verdict, to impeach it by claiming that the jury did not properly arrive at the verdict. Because he is a juror, he is incompetent to testify about the nature of the jury's deliberations in arriving at their verdict, and his affidavit may not be considered as evidence by this Court.

Appellant argues that Mr. Meyer's affidavit is in support of the first "verdict," and therefore it really supports the jury's verdict, and can be considered (App.Br. 53-54). However, as explained above, the first verdict form returned by the jury was expressly disavowed by eleven of the twelve jurors and was not accepted by the trial court, so it was not the jury's verdict at all. The second verdict returned by the jury was unanimous and was accepted by the trial court. This was the only verdict. Mr. Meyer's affidavit attempts to impeach that verdict. Therefore, his affidavit may not be considered by this Court. Appellant's reliance on Hooks v. Oklahoma, 19 P.3d 294, 312, n. 34 (Okla.Crim.App. 2001) (App.Br. 54), is misplaced; the juror's statements in the news article supported the jury's actual verdict by explaining that the hold-out juror changed her vote because she had originally misunderstood the law.

5. The trial court did not abuse its discretion in refusing to question the jurors about their deliberations

Appellant also claims that, after the jury returned its verdict, the trial court had a duty to invade

the province of the jury and question them about the particulars of their deliberations (App.Br. 56-59). Appellant's argument has no merit.

Contrary to appellant's assertion (App.Br. 56-57), polling the jury does not involve asking detailed questions about how the jurors arrived at their verdict. Rather, to poll the jury means to ask the jurors only whether or not the verdict is their verdict. Black's Law Dictionary defines polling the jury as follows:

> A practice whereby the jurors are asked individually whether they assented, and still assent, to the verdict. To poll a jury is to call the names of the persons who compose a jury and require each juror to declare what his verdict is before it is recorded. This may be accomplished by questioning them individually or by ascertaining fact or unanimous concurrence by general question, **and once concurrence has been determined, the polling is at an end.** If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

Black's Law Dictionary, Sixth Edition (1990) p. 1159 (citations omitted).

As shown above, the rule is that jurors may not be asked about their deliberations. State v. Johnson, 968 S.W.2d at 134; State v. Amrine, 785 S.W.2d at 535-36; State v. Babb, 680 S.W.2d at 152; State v. Underwood, 57 Mo. at 52. The jury had been sent back with the instructions and clean copies of all the verdict forms, had additional time to deliberate, had then returned a proper verdict, and the polling revealed that the verdict was unanimous (Tr. 1069-75). The trial court, *sua sponte*, asked the foreperson why the change, and she explained that they had simply misunderstood the law, thinking they were always required to sign the verdict for life imprisonment unless they unanimously agreed on

the verdict of death (Tr. 1075-76). None of appellant's authority allows for further judge questioning under these facts.

Appellant claims that unanimity is not required for a jury to reach a verdict of life imprisonment, and therefore the court must ask the jurors about each step of their deliberations, and make certain that each juror followed the particulars of all the instructions and process if a poll reveals that the jurors are not unanimous (App.Br. 56-57). Appellant ignores the fact that, by law, the verdict must be unanimous. Section 546.390, RSMo 2000 ("**When the jury have agreed upon a verdict**, they must be conducted into court by the officer having them in charge.") (emphasis added), Supreme Court Rule 29.01(a) ("The verdict shall be unanimous and be in writing" in every misdemeanor or felony case), MAI-CR 313.48A ("When you have concluded your deliberations you will complete the applicable form(s) **to which all twelve jurors agree** and return (it) (them) with all unused forms and the written instructions of the Court.").[2]

[2] Appellant also ignores the fact that, even in civil trials, where a jury really may return a verdict

without being unanimous, there is no statute or rule that permits, let alone requires, a judge to delve into the jurors' deliberative process to determine whether each juror followed the instructions correctly in arriving at the juror's decision. *See* § 494.490, RSMo 2000 ("Three-fourths or more jurors may return a lawful verdict"), Supreme Court Rules 71.01-06 (allowing judge in civil case to have jury render verdicts on specific facts, but nothing allows a judge to ask jurors how they reached their decision).

Appellant cites Peters for the proposition that if an inconsistency appears on the face of a single verdict, the court should "ask" the jury which aspect of the verdict is correct (App.Br. 56). However, Peters holds that the proper way for the court to "ask" this question is to send the jurors back for further deliberations until they reach a proper verdict. State v. Peters, 855 S.W.2d at 348-49 (the safest and most accurate way to have the jury resolve any ambiguity is to resubmit the counts to the jury to find out for certain the jury's intent). Nothing in Peters permits, let alone requires, the trial court to ask each juror about the deliberative process that had thus far taken place before sending the jury back for further deliberations.

Appellant cites the concurring opinion of an individual justice, Justice Blackmun, in Price v. North Carolina, 512 U.S. 1249, 114 S.Ct. 2777, 129 L.Ed.2d 888 (1994), for the proposition that the United States Supreme Court has recognized that the polling question allowed might be insufficient (App.Br. 57). However, the Court never reached the issue of the polling question. A concurring opinion by one Supreme Court Justice does not constitute a "recognition" by the Court that the polling procedure is insufficient in capital cases. In fact, in Justice Blackmun's concurrence, he stated that the problem was that the instructions themselves were defective, and the poll, alone, was insufficient proof for the state to meet its burden to show that the error in the instructions was harmless beyond a reasonable doubt. Id. Nothing in the concurring opinion shows that the United States Supreme Court thinks the polling procedure must be changed for death penalty cases. Therefore, appellant's reliance on Price is misplaced.

Appellant relies on State v. Stith, 660 S.W.2d 419, 424 (Mo.App. S.D. 1983), for the proposition that a court must be required to delve into the secrets of the jury's deliberations (App.Br.

58). However, Stith involves a claim of the jury being exposed to publicity about the case during the trial. Id. If there is evidence of the jury being exposed to publicity during the trial, and the defendant moves to inquire, the trial court should question the jurors. Sawyer v. State, 810 S.W.2d 536, 538 (Mo.App. E.D. 1991). But here, there was no evidence of the jury being exposed to publicity. Indeed, the only evidence of juror misconduct was the note that showed that one of the jurors may have lied during voir dire about his ability to impose the death penalty. Appellant specifically waived any inquiry into that misconduct; preferring instead to gamble on the verdict.

Appellant cites three cases, one from North Carolina, one from Tennessee, and one from Virginia, to show that because other states allow for a more detailed inquiry into the jury's findings on the death penalty, Missouri should, too (App.Br. 58-59). However, these cases do not support appellant's proposition. In State v. Buchanan, 410 S.E.2d 832, 845-46 (N.C. 1991), the jury filled out a "sentencing issues" sheet that listed each step of the process, but, under the statute, each juror is only asked whether he or she agrees with the verdict. In Bunch v. Thompson, 949 F.2d 1354, 1367 (4th Cir. 1991), the jury filled out a verdict form setting out which aggravating circumstance it found, and when polled, each juror stated that the verdict was his or hers. In Terry v. State, 46 S.W.3d 147, 158 (Tenn. 2001), the opinion states that "each juror was polled to determine whether that individual imposed a sentence of death in accordance with the trial court's instructions," and that the record indicated that each juror was unanimous on each step of the process. But the opinion does not explicitly state the question or questions asked of the jury or whether the polling was done pursuant to statutory mandate. Id. In each of these cases, the jurors imposed death, and were polled simply to see if they agreed with the verdict. These cases do not support appellant's argument that this Court, without any

statutory authority, "should adopt a procedure for polling the jurors" in which each juror, upon request of the defendant, must be questioned individually about the deliberative process taken to reach a verdict.

6. The trial court did not coerce the jury's verdict

Appellant argues that the trial court's actions coerced the jury's verdict, because the court did not give "further instruction to the jurors to clarify why they were sent back to deliberate further" (App.Br. 59-60).

Appellant did not ask that any "further instruction" be given to the jury, nor did he include this claim in his motion for a new trial (*see* Tr. 1068-70, L.F. 305-308). Therefore, this portion of his claim is reviewable, if at all, for plain error only. State v. Winfield, 5 S.W.3d 505, 516 (Mo. banc 1999) (where defendant failed to object at trial or include claim in motion for new trial, claim was not preserved for review).

As shown above, it is well-established that when polling reveals some ambiguity in the verdict, the proper procedure is for the court to send the jury back for further deliberations to resolve the ambiguity. Supreme Court Rule 29.01(d); State v. Peters, 855 S.W.2d at 347; State v. Lashley, 667 S.W.2d at 715; State v. Griffin, 28 S.W.3d at 482; State v. Barnett, 16 S.W.3d at 705; State v. Zimmerman, 941 S.W.2d at 824-25; New Mexico v. Apodaca, 940 P.2d at 483-84. Further, where "a jury is properly instructed on the law," the trial court may properly "restrict jury instructions to those already given." State v. Ringo, 30 S.W.3d 811, 818 (Mo.banc 2000).

In State v. Lashley, 667 S.W.2d at 715, the jury's verdict form, attempting to assess the death penalty, was in improper form. In response, the trial court told the jury the verdict was in improper

form, and had them retire and re-read the instructions. Id. On appeal, the defendant claimed that the trial court had coerced the verdict. Id. This Court disagreed, stating:

> The trial judge in this case not only correctly directed the jury to further deliberate and return a verdict in proper form, but was careful to not prejudice the defendant in any manner in so doing. The court merely told the jury that the verdict was not in proper form, and asked them to retire and read the instructions. The court in no manner indicated to the jury why the verdict was not in proper form, and clearly did not indicate his desires as to the form that they should return. The court could not have handled the situation in a more neutral manner. The point is denied.

Id.

Similarly, in the case at bar, when the jurors were polled and stated that the verdict was not theirs, the attorneys approached the bench (Tr. 1070). After a discussion with the attorneys, the court asked the jurors to return to the deliberation room, and told them they would get the instructions back in a minute or two (Tr. 1070). After obtaining clean verdict forms for the sentence of life imprisonment, the court returned all the verdict forms and instructions to the jury (Tr. 1069, 1071).

Nothing in the court's conduct coerced a specific verdict from the jury. The instructions were before the jury. The court sent back new verdict forms for the sentence of life imprisonment, so the jury knew that was still an option. The court in no way indicated which verdict the jury should impose. As in Lashley, the trial court could not have handled the situation in a more neutral manner. Therefore, there is no merit to appellant's claim that the trial court coerced the verdict.

Appellant claims that, under Peters, the trial court was required to explain exactly what the problem was (App.Br. 60). However, Peters concerned a problem with inconsistent verdicts. State v.

Peters, 855 S.W.2d at 347-48. When the trial court saw the inconsistent verdicts, he told the jury they had not followed the instructions, and said, "I'll have to ask you to go back to the jury room and read the instructions carefully and let us know when you've got it figured out." Id. at 347. There was no objection to the trial court's comments. Id. This Court said that the oral instruction "passes muster as being neutral," but that it would have been better for the court to instruct the jury in writing, telling the jury which verdicts were inconsistent. Id.[3]

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[3] Since Peters, there is a pattern instruction to use for inconsistent verdicts in criminal cases: MAI-CR 3d 312.06 (October 1, 1995). The instruction reads: "The Court cannot accept your verdicts as written. The verdicts are inconsistent as to Count(s) ___ [*Specify counts that are inconsistent*.]. You should examine your verdicts in light of all of the instructions. Do not destroy any of the verdict forms." The case at bar is not an inconsistent verdicts case, but this pattern instruction demonstrates that the judge should have minimal communication with the jury when the verdict is improper.

Unlike a case of inconsistent verdicts, where the jurors might have no idea why the judge is refusing their verdicts, here, it was obvious the verdicts were refused because eleven of the jurors disavowed it– no objection was raised until the polling of the jury, after the poll, the attorneys and judge held a conference, and then the jury was told to return to the deliberation room, and that they would be given the instructions again (Tr. 1066-70). Even if this had been a case of inconsistent verdicts, the trial court's instruction still "passes muster as being neutral," and certainly was not plainly erroneous.

7. The trial court's actions did not deprive appellant of his statutory right to jury sentencing

Appellant argues that by incorrectly refusing to accept the jury's initial verdict form, the trial court deprived him of his statutory right to jury sentencing (App.Br. 62-63).

"A defendant has no constitutional right to have a jury assess punishment." State v. Hunter, 840 S.W.2d 850, 863 (Mo.banc 1992). Rather, the right to jury sentencing is created by statute. State v. Taylor, 929 S.W.2d 209, 218-19 (Mo.banc 1996). Under § 565.030.4, RSMo 2000, if the jury "is unable to decide or agree upon the punishment" the case is given to the court to decide.

As shown above, in this case, the jury's initial verdict form was not a verdict at all, and the trial court was not allowed to accept it. After further deliberations, the jury determined that it was unable to agree upon the punishment, so the case was given to the court to decide. Thus, appellant was given the full scope of his statutory right to jury sentencing.

Appellant speculates that the jury might not have unanimously found that the evidence in aggravation of punishment warranted imposing the death penalty, and were thus required to return a verdict of life imprisonment (App.Br. 63-64). However, the law is "perfectly settled that jurors speak

through their verdict." State v. Babb, 680 S.W.2d at 152. By returning a proper verdict of being unable to agree on the punishment, and each agreeing that the verdict was his or her verdict, the jurors refuted appellant's speculative assertion. Therefore, there is no merit to appellant's argument.

8. The trial court did not violate double jeopardy

Appellant argues that the trial court's rejection of the initial verdict form violated double jeopardy (App.Br. 64-65). Appellant acknowledges that in State v. Peters, 855 S.W.2d at 349-50, this Court held that there was no violation of double jeopardy where the trial court refused the jury's initial verdict form in a death penalty case (App.Br. 65). Appellant argues that Peters is distinguishable because here, there was no reason to reject the jury's initial verdict form (App.Br. 65). However, as shown above, the trial court acted properly in rejecting the initial verdict form. Therefore, Peters controls, and there was no violation of double jeopardy.

9. The jury's verdict is not "inherently unreliable"

Finally, appellant argues that each of his claims together render the jury verdict unreliable (App.Br. 65-66). However, as shown above, there is no merit to any of his claims. Further, the jury was properly instructed on the law, and sending them back for further deliberations with all those instructions and with clean verdict forms was a proper response to the jury's failure to return a verdict. *See* State v. Ringo, 30 S.W.3d at 818 (when jury sent out question during deliberations, trial court properly restricted jury to instructions already given). Therefore, nothing in appellant's point shows that his sentence of death was inherently unreliable, and his claim must fail.[4]

[4] Respondent notes that, even if any of appellant's claims had merit, this Court could not

"reinstate" a verdict the jury never reached, as appellant requests (App.Br. 66). Nor would this Court be obliged to remand for another penalty phase. The most appellant could possibly request would be an evidentiary hearing. But, as shown above, he is not entitled to one. Even if an evidentiary hearing were held, no juror could testify to impeach the verdict, but jurors could testify in support of the verdict. State v. Babb, 680 S.W.2d at 152.

II.

The trial court did not abuse its discretion in admitting, during the second penalty phase, State's Exhibit 89, certified records of an "ex parte order," because the document would have been relevant to corroborate Robert Hiller's proposed testimony, and the later exclusion of that testimony did not render the trial court's initial ruling an abuse of discretion. In any event, appellant was not prejudiced because the jury was never shown the document, only heard the caption of the document, was never informed that it was an order of "protection," and there were no references to the document after its admission.

For his second point on appeal, appellant claims that the trial court abused its discretion in admitting State's Exhibit 89, an ex parte order (App.Br. 67). Appellant argues that the document was irrelevant, and its admission prejudiced him because the jury could infer from it that he had done something to warrant the issuance of the order (App.Br. 67).

1. Facts

At trial, the prosecutor called the clerk of the court of Pettis County, and prepared to offer State's Exhibit 89, an ex parte order against Kenneth Thompson (Tr. 714). Appellant objected to it on grounds that Linda Hiller's[5] statements in support of the order were hearsay (Tr. 715). The state explained that Bob Hiller, the next witness, would testify that he and his wife obtained the ex parte order against appellant after appellant sent them a Christmas card that stated, "Enjoy this Christmas with your girls. It will be your last" (Tr. 716). The court said the prosecutor was entitled to show that an order

[5] Linda Hiller was appellant's ex-wife (Tr. 745).

was issued, but could not ask the clerk about the facts supporting it (Tr. 718). Appellant said that without the facts supporting it, the issuance of the order was irrelevant (Tr. 718). The court said that no one would be allowed to pass the exhibit to the jury (Tr. 719).

Appellant had no objection to the certification of the order, so the clerk was excused (Tr. 726-27). At that point, the prosecutor stated:

> Your honor, at this time the state moves for the admission of State's Exhibit 89 which is a certified copy of a file from Pettis County, Cause No. CV 491-802DR, entitled Linda Hiller versus Kenneth Thompson, containing an ex parte order against Kenneth Thompson.

(Tr. 727). The document was admitted, but was never passed to the jury (Tr. 723, 727).

The prosecutor then called Mr. Hiller (Tr. 727). Appellant asked to approach, and said that Mr. Hiller's testimony would all be hearsay (Tr. 728). The prosecutor said that Mr. Hiller would testify that when his wife had been married to appellant, she came to work with bruises and cuts on her face, that when she moved in with Mr. Hiller, appellant threatened him on the phone and followed him in his car, that when he tried to adopt appellant's girls, appellant said for a thousand dollars he would not contest it, and that appellant sent him the threatening Christmas card, at which point they obtained an order of protection against appellant (Tr. 728-29). The court asked whether Mr. Hiller knew the writing on the Christmas card was appellant's, but the prosecutor was unsure, and appellant said that the prosecutor should not be allowed to bring that up at all because it would "ring the bell" (Tr. 731). The court told the prosecutor to call other witnesses, and check on whether he could identify appellant's handwriting (Tr. 734).

After the prosecutor called other witnesses, the court took a break to allow the prosecutor to

talk to Mr. Hiller (Tr. 744). Then the prosecutor called Mr. Hiller, and did not ask him about the Christmas card or the ex parte order (Tr. 745-49). The prosecutor did not mention the ex parte order in argument (Tr. 1012-27, 1052-56).

2. Standard of review

"The trial court is vested with broad discretion to admit and exclude evidence at trial. Error will be found only if this discretion was clearly abused." State v. Johns, 34 S.W.3d 93, 103 (Mo.banc 2000). "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." State v. Christeson, 50 S.W.3d 251, 261 (Mo.banc 2001).

"On direct appeal, we review the trial court 'for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial.'" State v. Johns, 34 S.W.3d at 103, *quoting* State v. Morrow, 968 S.W.2d 100, 106 (Mo.banc 1998).

3. The exhibit was relevant to Mr. Hiller's proposed testimony

Had Mr. Hiller been allowed to testify regarding the ex parte order, and had the jury been shown the ex parte order, the order would have been relevant to corroborate his testimony. State v. Smith, 32 S.W.3d 532, 546 (Mo.banc 2000) (evidence is relevant if it "corroborates other relevant evidence."); State v. Ervin, 979 S.W.2d 149, 158 (Mo. banc 1998) (broad range of evidence admissible in penalty phase); State v. Ferguson, 20 S.W.3d 485, 500 (Mo. banc 2000) (evidence of unadjudicated bad acts admissible in penalty phase).

Where the prosecutor adduces evidence on a good faith expectation that later evidence will

establish its relevance, the trial court does not err in allowing the admission of the evidence. *Compare* State v. Copeland, 928 S.W.2d 828, 841-42 (Mo.banc 1999) (prosecutor may refer to evidence in opening statement, even if evidence later excluded, if reference made in good faith); State v. Brooks, 618 S.W.2d 22, 24-25 (Mo.banc 1981) (trial court did not abuse discretion in overruling objection to opening statement because prosecutor had good faith basis for believing evidence would be admitted). Because the exhibit was relevant to corroborate Mr. Hiller's testimony, the trial court did not abuse its discretion in allowing the admission of the exhibit, even though Mr. Hiller's testimony was later excluded.

4. In any event, appellant was not prejudiced

Appellant's only claim of prejudice is that the jury might have speculated that he did "some violence or misconduct" that deserved having an ex parte order issued against him (App.Br. 75-76).

However, State's Exhibit 89 was not so prejudicial that it deprived appellant of a fair trial. State v. Johns, 34 S.W.3d at 103. As shown above, the jury never saw the exhibit. All the prosecutor was allowed to read into evidence was that in the case of Linda Hiller versus appellant, an "ex parte order" was issued against appellant (Tr. 727). It is highly unlikely that any of the jurors even knew what the legal term "ex parte" meant, or had any idea what an "ex parte order" actually was; they were not attorneys.

Further, the prosecutor never said that it was an order of "protection," so it is mere speculation that the jury thought appellant did "some violence or misconduct" to cause the order to be issued. The prosecutor's statement about the order was quite vague, giving no specifics about the order itself or the underlying basis for it. *See* State v. Simmons, 955 S.W.2d 729, 738 (Mo.banc 1997) (no mistrial

required where reference to other crimes was vague).

Also, the prosecutor did not refer to the ex parte order at any other time during the trial, and the exhibit was not passed to the jury. State v. Goodwin, 43 S.W.3d 805, 820 (Mo.banc 2001) (no prejudice where reference was isolated and not revisited in questioning or argument).

Appellant argues that, to the jury, the ex parte order was the same as a criminal conviction (App.Br. 75). However, nothing in the record provides any support for appellant's claim that the jury must have thought he had a "conviction" of "some sort of domestic abuse" (App.Br. 75), especially when all the evidence that appellant really had engaged in domestic abuse was excluded. Even if the jury had wondered about the basis for the order, Mr. Hiller's testimony that appellant had made a harassing phone call to him, calling him a "home wrecker," and that appellant had chased Mr. Hiller in his car (Tr. 747-48), would have satisfied that curiosity. Therefore, appellant has not shown prejudice, and his point must fail.

Appellant cites State v. Debler, 856 S.W.2d 641 (Mo.banc 1993), for the proposition that evidence of unconvicted misconduct is less reliable than evidence related to prior convictions (App.Br. 72). This is not what Debler held. As this Court has already explained many times, the error in Debler was not the admission of evidence of uncharged crimes, but rather lack of notice that the evidence would be used in the penalty phase. State v. Christeson, 50 S.W.3d at 269-70; State v. Ervin, 979 S.W.2d at 158 *and cases cited therein*. As stated above, during penalty phase, the state may introduce any evidence pertaining to a defendant's character, even if that evidence did involved uncharged crimes. State v. Christeson, 50 S.W.3d at 269 ("Evidence of a defendant's prior unadjudicated criminal conduct is admissible during the penalty phase."). Thus, appellant's statement of

the law is incorrect.

5. There was no prosecutorial misconduct

Appellant also raises a claim of "prosecutorial misconduct" when it only told the jury the caption of the case and that an ex parte order had been issued (App.Br. 73).

Appellant ignores the fact that his successful objections were what prevented the prosecutor from going into the details of the order (Tr. 715-19). The court specifically told appellant that his ruling preventing the state from eliciting any details about the order applied only to the state (Tr. 719). When the prosecutor began questioning the court clerk, appellant again objected (Tr. 720-24). After the prosecutor said she would only say the exhibit number, that it was an ex parte order, and that the case was Linda Hiller versus appellant, appellant said, "I don't want to persuade the Court to let then[sic] explain more than what's in there, but by the same token I think that information itself is what she's limited to and I would agree that she be limited to that." (Tr. 724). Appellant cannot complain that the prosecutor did not elicit more facts surrounding the ex parte order, when his objections prevented her from doing so. State v. Mayes, 63 S.W.3d 615, 627 (Mo.banc 2001) ("Defendant cannot now complain of error in a ruling he requested").

Appellant also appears to raise an allegation of a discovery violation (App.Br. 73). A claim of a discovery violation, raised for the first time on appeal, should never be considered by this Court, because the prosecutor has never had a chance to make a record to refute the claim. *Compare* State v. Taylor, 18 S.W.3d 366, 370 (Mo.banc 2000) (initial burden is on defendant to bring Batson challenge at trial); State v. Gray, 887 S.W.2d 369, 385 (Mo.banc 1994) ("A failure to make a timely Batson objection is fatal to such a claim.")

In any event, at trial, when the prosecutor first attempted to offer the exhibit, the record shows that appellant knew the ex parte order had been admitted at the last trial (Tr. 715). Later, when appellant objected to the deputy circuit clerk being called instead of the circuit clerk who had been endorsed,[6] the prosecutor specifically asked appellant if he was claiming surprise about the ex parte order, and appellant answered, "No. We were aware of that and we were prepared to deal with it. No, we're not claiming surprise." (Tr. 722). The prosecutor asked again if he was claiming surprise, "to make sure," and appellant again said, "No, I'm not claiming surprise" (Tr. 723). This record shows that appellant knew all about the ex parte order and was prepared to address it. Therefore, appellant's cases discussing trial counsel's inability to be prepared for trial are inapposite.

As to appellant's claim that the order had only been certified the second day of trial (App.Br. 73), appellant ignores the fact that, at trial, the prosecutor, as an aside, mentioned that there was some writing on the exhibit from the first trial, so she had obtained a clean copy (Tr. 722). This statement suggests that the reason the copy offered at trial had been certified recently is because the prosecutor had the clerk bring a clean copy of the same document to court. Thus, appellant's claims of surprise are completely groundless and refuted by the record, and his point must fail.

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[6] Later still, appellant said he had made a mistake, and he saw that the records custodian had been endorsed previously (Tr. 726).

III.

The trial court did not abuse its discretion in admitting scientific bloodstain evidence from Michael Van Straten tending to show that Arlene Menning was moving during appellant's attack because his testimony was relevant in that it corroborated the conclusions reached by John Prine and Dr. Jay Dix and it tended to show that Mrs. Menning was conscious when appellant murdered her. In any event, appellant was not prejudiced.

For his third point on appeal, appellant claims that the trial court abused its discretion in allowing both John Prine and Michael Van Straten to give scientific testimony about the bloodstain evidence in this case (App.Br. 78). Appellant argues that Mr. Van Straten's testimony was cumulative to Mr. Prine's, so it should not have been admitted, and that he was prejudiced because the state used photos of the crime scene with each witness (App.Br. 78).

1. Facts

During a pre-trial conference, appellant raised a motion in limine to exclude all bloodstain evidence (Tr. 215). Appellant asked the court to read the depositions of both of the state's experts before trial and determine for itself how relevant their testimony was, and the court declined, stating that the jury was to determine how relevant the evidence was (Tr. 218-29). Appellant agreed with the court that it was the jury's job to "determine . . . the weight of things," but reiterated that it was the court's job to balance "prejudice against relevance" (Tr. 220). Then the prosecutor explained to the court how the probative value of the evidence outweighed any prejudicial effect (Tr. 220-21). The trial court ruled that Mr. Van Straten could testify, and reserved ruling on the admissibility of the testimony from Mr. Prine (Tr. 221-22).

During trial, the state called Mr. Prine, and the court accepted him as an expert in bloodstain analysis (Tr. 563, 591-96). He testified that it was standard practice in his field to obtain a second opinion on his conclusions (Tr. 594). He testified about the science of bloodstain analysis, and, using photographs, explained how they showed that Mr. Menning's torso stayed stationary during appellant's attack, but her head and both of her arms moved during the attack (Tr. 599-618).

Then the state called Mr. Van Straten (Tr. 629). Appellant objected, claiming his testimony would be improper bolstering, cumulative, and prejudicial (Tr. 630). The trial court overruled the objection (Tr. 632). Mr. Van Straten, who had superior expert qualifications (Tr. 632-36), testified that he performed bloodstain analysis in this case and assisted Mr. Prine in examining the evidence (Tr. 636). He gave brief testimony using fewer photographs, and testified that he concluded that Mrs. Menning's arm and head moved during appellant's attack (Tr. 638-40).

The state also called Dr. Jay Dix, who testified that Mrs. Menning was alive when her hand was injured, and that those injuries were consistent with being defensive wounds (Tr. 782-83).

2. Standard of review

"The trial court is vested with broad discretion to admit and exclude evidence at trial. Error will be found only if this discretion was clearly abused." State v. Johns, 34 S.W.3d 93, 103 (Mo.banc 2000). "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." State v. Christeson, 50 S.W.3d 251, 261 (Mo.banc 2001).

"On direct appeal, we review the trial court 'for prejudice, not mere error, and will reverse only

if the error was so prejudicial that it deprived the defendant of a fair trial.'" State v. Johns, 34 S.W.3d at 103, *quoting* State v. Morrow, 968 S.W.2d 100, 106 (Mo.banc 1998).

Appellant claims that the trial court's ruling is not entitled to deference, because the trial court did not believe it needed to determine whether the evidence was relevant (App.Br. 80). However, the record reflects that the trial court did determine the relevance of the evidence before allowing its admission (Tr. 222, 563-67, 630-31). Taken in context, the trial court was simply explaining that the jury would hear Mr. Van Straten's expert qualifications and testimony and decide what weight to give it (Tr. 219-20). Therefore, there is no merit to appellant's allegation that the trial court abandoned its role to rule on the admissibility of evidence.

3. Mr. Van Straten's testimony was relevant

"The test for relevancy is whether the offered evidence tends to prove or disprove a fact in issue or corroborates other relevant evidence." State v. Smith, 32 S.W.3d 532, 546 (Mo.banc 2000). Mr. Van Straten's testimony fit both these prongs; it tended to prove a fact in issue, that Mrs. Menning was conscious during appellant's assault, and it tended to corroborate Mr. Prine's and Dr. Dix's testimony.

Mr. Van Straten's testimony showed that Mrs. Menning moved her arm and head sometime after appellant's assault began (Tr. 637-40). This tended to prove that Mrs. Menning was conscious during appellant's attack. Therefore, it was relevant to prove the circumstances of the crime, and help the fact-finder choose the appropriate sentence for it.

Also, Mr. Van Straten's testimony corroborated that of Mr. Prine and Dr. Dix. Appellant

challenged Mr. Prine's expert qualifications (Tr. 596), and Mr. Prine testified that it was standard procedure to get a second opinion (Tr. 594). Mr. Van Straten had superior expert qualifications, and his results were consistent with Mr. Prine's results (Tr. 632-42). If Mr. Van Straten had not testified, appellant would have been able to argue that Mr. Prine's testimony should not be believed, because his expert qualifications were weak, and the state was unwilling to call the expert who should have verified his results. Also, Dr. Dix testified that the injuries on Mrs. Menning's hand were consistent with defensive wounds, and Mr. Van Straten's testimony that she was moving sometime after appellant's assault began corroborates Dr. Dix's opinion.

4. The relevance of Mr. Van Straten's testimony was not outweighed by its prejudicial effect

Appellant argues that any "marginal relevance" of Mr. Van Straten's testimony was outweighed by the prejudice of him using photographs of the crime scene to explain his findings (App.Br. 78).

Appellant acknowledges that Mr. Van Straten only used five photographs during his testimony (App.Br. 82). State's Exhibit 36 showed the point of convergence around Mrs. Menning's head, which meant that she had been in that area during the entire assault (Tr. 635-637, 642). State's Exhibit 94 showed impact stains on the dresser, whose size and shape helped determine the origin of the blood (Tr. 637-38). State's Exhibit 61 showed that Mrs. Menning's head had moved sometime after appellant began attacking her (Tr. 638-39). State's Exhibit 96 showed that her arm had moved sometime after appellant began his attack (Tr. 639-40). State's Exhibit 93 showed that Mr. Menning did not move during appellant's attack (Tr. 640-41). Mr. Van Straten used a minimal number of photographs, and each photograph helped explain his testimony. State v. Christeson, 50 S.W.3d at

266 (gruesome photographs may be admitted "where they enable the jury to better understand the testimony"). Therefore, there was minimal prejudice from his use of the photographs to help explain his testimony.

Appellant argues that the use of the photographs was too prejudicial because the jury had already seen four of the five photographs (App.Br. 82). Appellant cites no case that holds that an expert's testimony is rendered inadmissible if the evidence that supports his testimony has already been seen by the jury. Appellant cites no case that holds that an expert may not use photographs to explain his testimony if those photographs depict bloodstains and wounds the defendant caused. On the contrary, "Photographs, although gruesome, may be admitted where they show the nature and location of wounds, where they enable the jury to better understand the testimony, and where they aid in establishing any element of the state's case." State v. Middleton, 995 S.W.2d 443, 462 (Mo.banc 1999). Because Mr. Van Straten's testimony was relevant to corroborate Mr. Prine's and Mr. Dix's testimony and to establish the nature of the offense, and the photographs helped the jury understand his testimony, the photographs were admissible, and any prejudice from the photographs did not outweigh the probative value of Dr. Van Straten's testimony.

5. Mr. Van Straten's testimony was not excludable on grounds of being "cumulative"

Appellant argues that Mr. Van Straten's testimony was "cumulative" to Mr. Prine's and therefore should have been excluded (App.Br. 83-86).

However, as shown above, Mr. Van Straten's testimony was probative in its own right because it corroborated that of Mr. Prine and Mr. Dix, and his testimony was relevant to an issue appellant disputed: that Mrs. Menning was conscious and tried to defend herself during appellant's attack.

Appellant cites no case that holds that a conviction should be reversed for the admission of cumulative evidence. In fact, one of the cases he cites (App.Br. 84, 86), State v. Green, 603 S.W.2d 50, 52 (Mo.App. E.D. 1980), expressly holds that "Even if evidence is cumulative, that alone is not sufficient to exclude its admission." Appellant cites Kluck v. State, 30 S.W.3d 872, 879 (Mo.App. S.D. 2000), for the proposition that "when cumulative evidence is only marginally relevant, it should be excluded" (App.Br. 84). Kluck does not so hold. What Kluck holds is that a trial court has considerable discretion in deciding whether to admit or exclude evidence, and it was within the court's discretion to refuse to admit evidence that was marginally relevant and cumulative to other testimony. Id. While trial courts certainly may exercise their discretion to reduce the amount of marginally relevant, cumulative evidence adduced at trial, that does not mean it is error, let alone reversible error, for a trial court to exercise its discretion to allow the admission of such evidence.

Appellant cites State v. Seever, 733 S.W.2d 438 (Mo.banc 1987), and State v. Cole, 867 S.W.2d 685 (Mo.App.E.D. 1993), to support his claim that the state should not be allowed to present "the same testimony" in multiple forms (App.Br. 86). However, these cases dealt with improper bolstering. Improper bolstering only occurs when a party introduces out-of-court statements of a testifying witness, those statement "wholly duplicate the live testimony" of the witness at trial, and in effect, allow the same witness to testify twice. State v. Silvey, 894 S.W.2d 662, 672 (Mo.banc 1995). Here, there was no attempt to introduce Mr. Prine's out-of-court statements. Therefore, there was no improper bolstering, and appellant's reliance on Seever and Cole is misplaced.

6. In any event, appellant could not have been prejudiced from the admission of "cumulative" evidence

Finally, even if appellant were correct in arguing that Mr. Van Straten's testimony was merely cumulative to Mr. Prine's, he would not be able to show prejudice. The admission of testimony that is merely cumulative to other testimony does not prejudice a defendant. State v. Goodwin, 43 S.W.3d 805, 818 (Mo.banc 2001) (wrongful admission of testimony not plain error if merely cumulative to proper evidence); State v. Bucklew, 973 S.W.2d 83, 93 (Mo. banc 1998) (a defendant suffers neither prejudice nor reversible error where evidence is improperly admitted if the evidence properly before the court establishes essentially the same facts); State v. Johnston, 957 S.W.2d 734, 745 (Mo.banc 1997) (failure to suppress evidence was not prejudicial where evidence was at most cumulative to other evidence in the case).

Appellant argues that the use of the photographs prejudiced him, in part because more photographs were on display "throughout" Mr. Prine's testimony (App.Br. 81). However, Mr. Prine did not display the photographs throughout his testimony. He was handed each photograph (e.g. Tr. 599, 603), he held it up while he explained it (e.g. Tr. 600), and set it down on the witness stand afterwards, where it could not be seen (e.g. Tr. 603). The prosecutor's reference to leaving a photograph "up there in case you need it again," (Tr. 604), does not mean that the photographs were on display the entire time, it means that the photographs were left sitting on the witness stand during the testimony instead of being returned to counsel table.

Further, Mr. Van Straten only used five photographs, the prosecutor handed him each photograph individually, and each was only displayed while being used to explain the testimony (Tr. 638-41). The use of these photographs did not deprive appellant of his right to a fair trial. State v. Johns, 34 S.W.3d at 103 (reversal only required where admission of evidence is so prejudicial it

deprives the defendant of a fair trial). Therefore, appellant could not have been prejudiced, and his point must fail.

IV.

The trial court did not plainly err or abuse its discretion in admitting photographs of the crime scene and autopsy because the photographs were relevant and admissible in that they depicted the crime scene, the nature and location of the victim's wounds, and aided in expert testimony.

For his fourth point on appeal, appellant claims that several photographs should not have been admitted because they were cumulative and prejudicial (App.Br. 87).

1. Standard of review

At trial, appellant objected to admitting both State's Exhibits 95 and 35 on grounds that they were cumulative to each other, to admitting both 37 and 93 on grounds that they were cumulative to each other, and to admitting 84-86 and 97 on grounds that they were cumulative to each other (Tr. 460, 462, 480). Appellant concedes that his claims that State's Exhibit 43 was cumulative to other exhibits, and that 80, 87 and 88 were cumulative to other exhibits, is not preserved (App.Br. 89, 91); he did not object, or objected on different grounds, or failed to raise the claim in his motion for new trial as to each of these exhibits (Tr. 475, 496, 534, L.F. 322).

"The trial court has broad discretion in determining the admissibility of photographs." State v. Christeson, 50 S.W.3d 251, 266 (Mo.banc 2001). "Photographs, although gruesome, may be admitted where they show the nature and location of wounds, where they enable the jury to better understand the testimony, and where they aid in establishing any element of the state's case." Id., *quoting* State v. Middleton, 995 S.W.2d 443, 462 (Mo. banc 1999); State v. Rhodes, 988 S.W.2d 521, 524 (Mo. banc 1999). "If a photograph is relevant, it should not be excluded simply because it

may be inflammatory. As with other relevant evidence, a photograph should not be excluded from evidence unless its prejudicial effect is greater than its probative value. Insofar as photographs tend to be shocking or gruesome, it is almost always because the crime is shocking or gruesome." State v. Rousan, 945 S.W.2d 831, 844 (Mo. banc 1998).

Appellant's unpreserved claims are reviewable for plain error only. "Under the plain error rule, 'Appellant must make a demonstration that manifest injustice or a miscarriage of justice will occur if the error is not corrected.'" State v. Worthington, 8 S.W.3d 83, 87 (Mo. banc 1999).

2. State's Exhibits 35 and 95 were properly admitted

State's Exhibit 35 is a side view of the Menning's entire bed, including the part of the headboard above the Menning's heads. It provides an overall side view of the bodies as appellant left them, taken from Mrs. Menning's side of the bed.

State's Exhibit 95 is a closer view taken from the same angle. It does not include the whole bed, and does not show all of Mrs. Menning's head and legs. Instead, it focuses in on Mrs. Menning's torso, showing bloodstains that are not visible on State's Exhibit 35, and better depicting the lack of bloodstains around part of her right arm.

Because each of these photographs has probative value apart from the other, they are not simply identical to each other, and the trial court did not abuse its broad discretion in admitting both.

Appellant complains that the prosecutor had planned to use State's Exhibit 95 with the bloodstain experts, but did not (App.Br. 89). To admit a photograph, the witness must be able to lay a foundation that the photograph is a fair and accurate representation of the subject matter of the photograph. State v. Robinson, 484 S.W.2d 186, 189 (Mo. 1972). It was necessary, therefore, for

the prosecutor to lay a foundation for the crime scene photographs and obtain their admission during Sergeant Kaiser's testimony, the evidence collection officer at the crime scene (Tr. 436-38, 495-500). The prosecutor's later decision not to use State's Exhibit 95 with the bloodstain experts does not mean that the photograph was lacking in probative value, it only means that the jury had even less exposure to the photograph, and any possible prejudice to appellant was even less than it otherwise would have been. Therefore, appellant's argument has no merit.

3. State's Exhibits 37 and 93 were properly admitted

State's Exhibit 37 is a side view of the Mennings in bed, taken from Mr. Menning's side of the bed. It shows larger bloodstains on the sheet, comforter, and Mrs. Menning's legs, demonstrating the force appellant used in beating the Mennings, causing the blood to go several feet from the point of impact.

State's Exhibit 93 is a close-up view taken from the same angle. Unlike State's Exhibit 37, State's Exhibit 93 shows all of Mr. Menning's pillow above his head, is a clearer view of the bloodstains on the inside of Mrs. Menning's arm, and does not show the bloodstains on the lower part of the sheet, the comforter, and Mrs. Menning's legs. Mr. Prine used State's Exhibit 93 to help explain his findings that Mrs. Menning had moved her left arm sometime after appellant began his attack, as shown by the blood that could not have been deposited had her arm been in that position during the entire attack, and Mr. Van Straten used State's Exhibit 93 to help explain his finding that Mr. Menning had not moved during the attack (Tr. 609-11, 640-41).

Because each of these photographs had probative value apart from the other, the trial court did not abuse its broad discretion in admitting both of them.

4. State's Exhibit 43 was properly admitted

State's Exhibit 43 depicts the impact wounds to Mr. Menning's head, and the bloodstains on the headboard and wall above his head. Mr. Prine used this exhibit to explain that the Mennings stayed in the same general position on the bed during the attack (Tr. 613-15).

Appellant argues that this photograph was cumulative to State's Exhibits 37-41, 47, and 93 (App.Br. 89). However, none of these photographs includes Mr. Menning's head wounds and the bloodstains on the headboard and wall behind his head. No bloodstains on the wall or headboard are visible in State's Exhibits 37, and 93. State's Exhibits 38, 39 and 47 do not show the bed at all, and only show a small portion of the top of the headboard, if at all. State's Exhibit 41 only shows the bloodstains on the upper part of the headboard and the wall. State's Exhibit 40 only shows the bloodstains from the top of the pillow to just above the top of the headboard.

In sum, none of these other exhibits shows a view that both includes Mr. Menning's head wounds and the bloodstains on the bed, headboard, and wall. Thus, State's Exhibit 43 had probative value apart from the other exhibits, and the trial court did not plainly err in allowing its admission.

5. State's Exhibits 80 and 88 were properly admitted

State's Exhibit 80 depicts the injuries appellant inflicted on Mr. Menning's skull. The photograph is taken from the front left side, and a ruler shows length and width of the open defect in Mr. Menning's skull. This exhibit helped explain Dr. Dix's testimony that Mr. Menning suffered skull fractures and an open defect in his skull, and that an open defect indicates repeated, severe blows to the same location (Tr. 777-79).

Appellant claims that this exhibit was cumulative to State's Exhibits 82 and 83 (App.Br. 92).

However, State's Exhibit 82 is taken from a different angle, and unlike State's Exhibit 80, it shows that portions of the skull were indented along the fractures, and it is easier to see that the brain was actually exposed through the open defect. State's Exhibit 83 was taken from the top right side, and depicts fractures and cuts not visible in State's Exhibit 80. Thus, State's Exhibit 80 had probative value apart from State's Exhibits 82 and 83, and the trial court did not plainly err in admitting this photograph.

State's Exhibit 88 depicts the injuries appellant inflicted on Mrs. Menning's skull. It is taken from the left side, and shows bruising to the skull, and several fractures extending from her ear.

Appellant claims that this photograph was cumulative to State's Exhibit 87 (App.Br. 92). However, unlike State's Exhibit 88, State's Exhibit 87 does not show the fractures radiating out from above Mrs. Menning's ear. State's Exhibit 88 is a top view of the skull, and shows a skull fracture which extends from the right to the left of the skull, and another crossing that one which extends from the front to the back of the skull. Therefore, State's Exhibit 87 had probative value apart from State's Exhibit 88, and the trial court did not plainly err in admitting it.

Appellant complains that Dr. Dix did not display State's Exhibit 88 during his testimony (App.Br. 92). However, limiting the jury's exposure to a photograph does not make the photograph irrelevant. In fact, according to appellant's argument (App.Br. 93), the fewer times a photograph was shown, the less prejudice he suffered from its admission. Appellant's argument has no merit.

6. State's Exhibits 84-86 were properly admitted

Appellant claims that State's Exhibits 84-86 should have been excluded because they were cumulative to State's Exhibit 97 (App.Br. 91-92). State's Exhibit 97 depicts an unobstructed view of three wounds on the forehead and side of Mrs. Menning's head. State's Exhibit 84 is closer in, and

includes a ruler measuring along the middle of the three wounds. In State's Exhibit 85, the ruler measures the upper wound. In State's Exhibit 86, the ruler measures the lower wound. Thus, each photograph has probative value apart from the others– State's Exhibit 97 shows all three wounds without any interference, and the other three exhibits show how long each of the wounds is. Therefore, the trial court did not abuse its discretion in admitting the photographs.

Once again, appellant complains that Dr. Dix did not show the photographs with the ruler during his testimony (App.Br. 92). But, as shown above, the photographs measuring each injury had probative value apart from State's Exhibit 97, and lessening the jury's exposure to the photograph should not be a ground for finding the photograph inadmissible. By showing the length of each wound, these photographs showed the "nature and location of wounds," State v. Christeson, 50 S.W.3d at 266, and were admissible whether or not specifically referred to by an expert. Therefore, appellant's argument has no merit.

V.

The trial court did not abuse its discretion in sustaining the prosecutor's objection to appellant asking Tracey Burr why she moved to South Dakota because the question sought to elicit irrelevant evidence in that Mrs. Burr's state of mind in moving to South Dakota could not prove appellant's state of mind in moving there. In any event, appellant has not shown prejudice.

For his fifth point on appeal, appellant claims the trial court abused its discretion in sustaining the state's objection to his asking Tracey Burr[7] why she moved to South Dakota (App.Br. 96). Appellant claims that Mrs. Burr would have answered that she moved to South Dakota in order to avoid being arrested on bad check charges, and that this testimony would have showed that appellant was willing to "sacrifice for her" and "protect their relationship" (App.Br. 96).

1. Facts

At trial, during cross-examination of Mrs. Burr, appellant elicited testimony that she had convictions for bad check charges and tampering with a witness (Tr. 294-96). Later, appellant asked, "Could you tell us why you moved to South Dakota?" (Tr. 318). The prosecutor objected, and appellant said that he anticipated she would answer that she moved there to avoid being arrested on an outstanding warrant in a bad check case (Tr. 318-19). Appellant said that this answer would show that he moved to South Dakota with her to help her avoid arrest, and that this would show that he "was

[7] Mrs. Burr was appellant's ex-wife (Tr. 246).

willing to do an awful lot for her" (Tr. 319-20). The trial court sustained the objection (Tr. 323).

2. Standard of review

"The trial court is vested with broad discretion to admit and exclude evidence at trial. Error will be found only if this discretion was clearly abused." State v. Johns, 34 S.W.3d 93, 103 (Mo.banc 2000). "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." State v. Christeson, 50 S.W.3d 251, 261 (Mo.banc 2001).

"On direct appeal, we review the trial court 'for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial.'" State v. Johns, 34 S.W.3d at 103, *quoting* State v. Morrow, 968 S.W.2d 100, 106 (Mo.banc 1998).

"The test for relevancy is whether the offered evidence tends to prove or disprove a fact in issue or corroborates other relevant evidence." State v. Smith, 32 S.W.3d 532, 546 (Mo.banc 2000).

3. Appellant's question sought to elicit irrelevant evidence

Appellant tried to ask Mrs. Burr why she moved to South Dakota (Tr. 318). The reason Mrs. Burr moved was irrelevant to any issue in the case. Even if Mrs. Burr moved to avoid being arrested, that conduct did not make appellant any more or less deserving of the death penalty. Because Mrs. Burr's motivations for moving were irrelevant to any fact in issue, the trial court did not abuse its broad discretion in sustaining the prosecutor's objection to appellant's question.

Appellant argues that Mrs. Burr's motivations for moving would also prove appellant's motivations for moving (App.Br. 99). Appellant claims that if Mrs. Burr had said that she moved to

avoid being arrested, it would prove that appellant moved in order to protect her from being arrested (App.Br. 99). But Mrs. Burr and appellant do not share the same mind. Appellant's subjective motivations for moving to South Dakota could have been entirely different from Mrs. Burr's. Her testimony as to why she moved could not show why appellant moved. Therefore, her testimony was irrelevant to this issue, and appellant's point must fail.

4. In any event, appellant has not shown prejudice

Appellant complains he was prejudiced because he was denied the opportunity to show that he was devoted to his relationship with Mrs. Burr, and went to great lengths to protect the relationship (App.Br. 99-100). However, appellant was able to elicit similar testimony through several witnesses at trial.

In cross-examination of Mrs. Burr, appellant elicited evidence that he had been a good father and husband, that he was upset when his daughters were adopted, and that when Mrs. Burr said she wanted a divorce, he tried many times to convince her to stay with him (Tr. 289-92, 297-306, 316-18). Appellant called Roger Brink, who testified that appellant was a great father, that he "worshiped" Mrs. Burr, that when Mrs. Burr originally left him, he was depressed (Tr. 895-96). Appellant called Karen Brink, who testified that appellant was a good father, that Mrs. Burr was not always kind to appellant, but he was "devastated" when she originally left him, and that when she returned, she and appellant again lived together, and appellant supported the family (Tr. 904-907, 911-15).

This shows that appellant was able to put on evidence that he was devoted to his relationship with Mrs. Burr. The trial court's sustaining of the prosecutor's objection did not deprive him of the opportunity to present his defense to the jury. Therefore, even assuming Mrs. Burr's testimony as to

why she moved could have any relevance to appellant's own motivations for moving, appellant was not deprived of a fair trial by its exclusion, and his point must fail.

VI.

The trial court did not abuse its discretion in overruling appellant's objection to the question of whether Sheriff Spencer knew what specific acts appellant committed to escape from jail because appellant has not shown a violation of his motion to suppress in that he failed to show that Sheriff Spencer's knowledge was based solely on his interview of appellant, and even if it were, appellant opened the door by inquiring by inquiring about knowledge he obtained from the interview. In any event, appellant has not shown prejudice.

For his sixth point on appeal, appellant claims that the trial court abused its discretion in allowing admission of testimony that he was the one who opened the lock to the cell door (App.Br. 101).

1. Facts

On July 23, 1997, appellant and five other men escaped from the Benton County jail (Tr. 571-72). About two hours after appellant and two other escapees were apprehended, Sheriff Spencer questioned appellant about the escape, hoping to get information about where the other three men were (1st L.F. 497–98). During this interview, appellant said that with his knowledge of carpentry, he had seen that the locks to the jail cell could be opened with a piece of plastic, and he was the one who opened them (1st L.F. 495-96).

Appellant filed a motion to suppress this statement, claiming that the statements were made in violation of the Fifth and Sixth Amendments because he already had representation on his murder charges at the time of the questioning about the escape (1st L.F. 492-93).

Appellant's motion was one of many subjects discussed in conferences prior to opening statements (1st Tr. 805-882). During the discussion, the prosecutor, Ms. Koch, stated that appellant's

motion was in regard to the Miranda warnings, that it was her understanding that no Miranda warnings were given to appellant at the time of the statement, and therefore she consented to the motion to suppress statements (1st Tr. 819). Ms. Koch agreed that it applied to both Sheriff Spencer and Deputy Fajen (1st Tr. 819). The trial court sustained the motion "by agreement" (1st Tr. 820).

At the retrial of appellant's penalty phase, the prosecutor, Ms. Smith, called Dep. Fajen, who testified that appellant had been a "very good inmate up until the time he escaped" (Tr. 570). Dep. Fajen had investigated the escape, and explained that the six inmates had escaped by wedging something into the lock of the cell door to prevent it from locking, picking the lock on a closet, crawling above the steel cells to the brick wall, and digging out the mortar between the bricks to make a hole (Tr. 572-75). Through investigation, officers learned that appellant and two others were staying at a motel in a town about two hours away from the jail, where they were captured (Tr. 576-77).

The prosecutor asked Dep. Fajen if he was present during the interview when appellant was talking about his escape (Tr. 577). Appellant objected, and said that there had been a motion to suppress at the first trial which the court had granted (Tr. 577-78). The prosecutor thought the motion had been sustained on different grounds, but stated that she had not read that part of the transcript in a long time, and offered to end her questioning of Dep. Fajen and revisit the issue later with Sheriff Spencer (Tr. 579-81).

The prosecutor called Darrell Patterson, who testified that he had talked with appellant at a later time about his escape, and appellant said "if he got the opportunity or got the chance he'd do it again" (Tr. 735).

Later, the prosecutor called Sheriff Spencer, who testified that before he escaped, appellant had

been in the jail house yard looking at the fence (Tr. 751-52). Sheriff Spencer told appellant "not to get any ideas about going over the fence," and appellant replied that "he had no intentions of escaping" and "he'd prefer that he went to trial" (Tr. 752). About two months later, when the fences were down because they were being replaced, appellant escaped (Tr. 752-53). The prosecutor did not question Sheriff Spencer about appellant's picking the locks.

During cross-examination, appellant asked Sheriff Spencer whether, to his knowledge, appellant committed any violence to escape, and Sheriff Spencer said no (Tr. 753-55).

On re-direct examination, the prosecutor said, "Without telling us anything that anyone has told you, what specific acts were done by the defendant that allowed him to escape?" (Tr. 755). Appellant objected on grounds of being beyond the scope of cross-examination, and the objection was overruled (Tr. 756). Sheriff Spencer answered that he was one of the six who had taken 3-4 days to dig through the brick wall (Tr. 756). The prosecutor asked what specific acts appellant had done, and appellant objected, claiming that any information about appellant's participation in the escape came from the excluded interrogation (Tr. 756). The prosecutor argued that the statements themselves were excluded, but that he had opened the door to questioning about the specific acts appellant did when he asked whether, to Sheriff Spencer's knowledge, appellant had committed any violence in escaping (Tr. 756-57). The trial court said appellant did open the door, and overruled the objection (Tr. 758). Appellant did not ask to voir dire Sheriff Spencer to show that the only basis for his knowledge was the interview with appellant.

Then the following took place:

Q. . . . To the best of your knowledge what specific acts, just the acts, did the defendant

perform in order to facilitate his escape?

A. He was the one that jimmied the locks to get out of the cell and into the sally port area. (Tr. 758).

The prosecutor only referred to this evidence once more, in the rebuttal portion of closing argument (Tr. 1053).

2. Standard of review

"The trial court is vested with broad discretion to admit and exclude evidence at trial. Error will be found only if this discretion was clearly abused." State v. Johns, 34 S.W.3d 93, 103 (Mo.banc 2000). "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." State v. Christeson, 50 S.W.3d 251, 261 (Mo.banc 2001).

"On direct appeal, we review the trial court 'for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial.'" State v. Johns, 34 S.W.3d at 103, *quoting* State v. Morrow, 968 S.W.2d 100, 106 (Mo.banc 1998).

3. The trial court properly overruled the objection to the question of what acts appellant committed because appellant failed to show that Sheriff Spencer's knowledge came solely from his interview with appellant

Appellant claims that the prosecutor's question about the acts he committed to escape from jail called for information elicited during an interview performed in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) (App.Br. 101).

At trial, the prosecutor did not ask Sheriff Spencer what appellant told him in the interview. Rather, the prosecutor asked, to his knowledge, what acts appellant committed to escape (Tr. 758). This question did not specifically call for information gained during the interview; it asked for knowledge Sheriff Spencer had, whatever the source.

Appellant asserted that all Sheriff Spencer's knowledge about appellant's participation in the escape came from his interview with appellant (Tr. 756). The prosecutor did not concede to this statement (Tr. 756). Factual allegations made by defense counsel are not self-proving. State v. Smith, 944 S.W.2d 901, 921 (Mo.banc 1997). Appellant could have asked to voir dire Sheriff Spencer to find the basis of his knowledge that appellant was the one who jimmied the cell door locks, but appellant did not do so.

If Sheriff Spencer learned this fact through some other source than his interrogation of appellant, then appellant's motion to suppress was not violated by the prosecutor's question. State v. Lingar, 726 S.W.2d 728, 737 (Mo.banc 1987), (evidence is not fruit of the poisonous tree if it was procured from a source independent of the constitutional violation). Thus, there would be no violation of appellant's motion to suppress the statements he made in his interview, because the evidence of his participation would have come from a source independent of the interview. Because appellant did not show that Sheriff Spencer's knowledge came solely from his interview with appellant, appellant cannot show that it was an abuse of discretion for the trial court to allow the testimony. Therefore, appellant's point must fail.

4. Assuming evidence of appellant's acts during the escape came solely from the interview, appellant opened the door by inquiring about knowledge that would only

have come through the interview

As shown above, after appellant objected, the prosecutor did not ask Dep. Fajen about appellant's acts in escaping (Tr. 577-81). On direct examination of Sheriff Spencer, the prosecutor also stayed clear of the subject (Tr. 750-53). Then, on cross-examination, appellant asked Sheriff Spencer "To your knowledge did he commit any violence in order to enable himself to escape?" (Tr. 755). If, as appellant alleges, Sheriff Spencer's knowledge of appellant's acts while he was out came solely from his interview of appellant, this question directly asked Sheriff Spencer for information he obtained from his interview with appellant.

Because appellant first inquired about his statement to Sheriff Spencer, and because appellant only brought out the part of his statement that was favorable to him, that he committed no violence in escaping, appellant opened the door to the prosecutor's bringing out another part of his statement, that he did take active part in the escape. *See* Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) (suppressed confession could be used to impeachment defendant's trial testimony); State v. Lingar, 726 S.W.2d at 734-35 (evidence of plea agreement with co-conspirator became admissible after defendant raised issue of existence of plea agreement on cross-examination); State v. Stuckey, 680 S.W.2d 931, 934 (Mo.banc 1984) (evidence excluded for non-disclosure could be used to impeach defendant's testimony); State v. Skillicorn, 944 S.W.2d 877, 891 (Mo.banc 1997) (under rule of completeness, where state elicits unfavorable parts of defendant's statement, defendant is allowed to admit even self-serving parts of same statement). After appellant inquired about the self-serving aspects of his statement to Sheriff Spencer, the prosecutor was entitled to inquire about a single detail of the statement that tended to rebut appellant's inference. Therefore, the trial court did not abuse

its discretion in allowing the question.

5. In any event, appellant has not shown prejudice

Even assuming the trial court abused its discretion in allowing the prosecutor's question, appellant has not shown prejudice from this action, because it was no more prejudicial than the other properly adduced evidence about his escape, and it was a minor detail when compared with the evidence of the horrible nature of appellant's crimes.

The following evidence about the escape was properly adduced: appellant was a well-behaved prisoner at the jail until he escaped (Tr. 570, 751), appellant told a jailer that he was not an escape risk, and then he escaped (Tr. 751-52), appellant waited for the opportunity to escape when the fences were down (Tr. 752-53), appellant was one of the six men who wedged something into the cell lock to keep it from locking, picked the lock on the closet door, gained access to the outside brick wall through the closet, spent three or four days digging the mortar out from around the bricks, and escaped (Tr. 572-75, 756), and after the escape, appellant said if he got the chance he would escape again (Tr. 735).

Thus, the jury already knew that appellant's good behavior in Potosi could be explained by him waiting for his chance to escape, he would try to escape if he got the chance, any inference that he would not try to escape could not be believed, and he participated with the other men as they overcame locks and dug through walls over several days. Even without the evidence that appellant was the one of the six who "jimmied" the lock, the prosecutor was still fully able to argue to the jury that appellant was an escape risk who behaved well until he was able to escaped by waiting for the opportunity and overcoming security devices. A defendant suffers neither prejudice nor reversible error where evidence is improperly admitted if the evidence properly before the court establishes essentially the same facts.

State v. Bucklew, 973 S.W.2d 83, 93 (Mo. banc 1998).

Moreover, as shown by respondent's Statement of Facts and Point XII, the evidence at trial proved the horrible nature of appellant's crimes, and that they were worthy of the death penalty. In light of all the other admissible evidence concerning appellant's escape, and all the evidence concerning the crimes themselves, appellant was not prejudiced by this single item of evidence. Therefore, appellant's point must fail.

VII.

This Court should not review appellant's unpreserved claims of closing argument error. In any event, the trial court did not plainly err in allowing the prosecutor's various arguments, because they did not personalize, misstate the law, or "improperly juxtapose" the rights of appellant and the Mennings.

In his seventh point on appeal, appellant claims multiple grounds of error in several transcript pages of closing argument (App.Br. 106-110). The transcript pages are included in Respondent's Appendix (Resp.App. A6-A27).

1. Standard of review

In a footnote, appellant acknowledges that his entire point is unpreserved except as to one statement (App.Br. 106, 108). However, his claim as to this statement is also unpreserved, because he did not state the legal grounds for his objection, he only said the argument was "highly improper" (Tr. 1055). State v. Worthington, 8 S.W.2d 83, 90 (Mo.banc 1999) (to be preserved, the objection at trial must be specific, containing the proper ground for the objection).

> Appellate courts are loathe to review claims of error in argument where there was no objection: Courts especially hesitate to find plain error in the context of closing argument because the decision to object is often a matter of trial strategy, and "in the absence of objection and request for relief, the trial court's options are narrowed to uninvited interference with summation and a corresponding increase of error by such intervention."

State v. Mayes, 63 S.W.3d 615, 632 (Mo.banc 2001) (citation omitted). These claims should not be reviewed on appeal because trial counsel often chooses not to object for trial strategy reasons:

> Our rule is that "relief should be rarely granted on assertion of plain error to matters contained in closing argument, for trial strategy looms as an important consideration and such assertions are generally denied without explanation."

State v. Kinder, 942 S.W.2d 313, 329 (Mo.banc 1996). Therefore, respondent urges this Court not to grant plain error review of appellant's claims.[8]

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[8] All of appellant's claims are improperly briefed. Appellant raises multiple grounds of closing argument error in a single point, Supreme Court Rule 84.03(d) (each point relied on must identify the trial court ruling that the appellant challenges), and he fails to identify some argument about which he complains, instead citing to seven transcript pages, asking this Court to discover for itself what statements might fit into his category of error (App.Br. 108-110). State v. Thompson, 985 S.W.2d 779, 784, n.1 (Mo.banc 1999) (claims not preserved where court must parse argument and discern the gist of the claims); Thummel v. King, 570 S.W.2d 679, 684-86 (Mo.banc 1978); Supreme Court Rule

30.20 (improperly briefed claims considered for plain error only).

In any event, in reviewing a claims of closing argument error, this Court has held that: "Both parties have wide latitude in arguing during the penalty phase of a first-degree murder case." State v. Storey, 40 S.W.3d 898, 910 (Mo.banc 2001). Even where argument is reviewed for abuse of discretion, rather than plain error, to require reversal, the argument must have had a "decisive effect" on the jury's determination. State v. Mayes, 63 S.W.3d at 633.

2. The argument did not constitute improper personalization

Appellant argues that five statements in closing argument constituted improper personalization (App.Br. 107). The prosecutor's argument is set out below; the statements about which appellant complains are in boldface:

> [The Mennings] were silenced forever. They were given no opportunity to ask for mercy. And **their only opportunity to ask for justice is here.**
>
> This case is as much about justice for them as it ever was about justice for their murderer. Do not for a second be confused that this case is **their say**. And **their voice will come from the jury**. The only question is, what will they be allowed to have and what will that statement be. . . .
>
> This case is about justice for Arlene and Clarence. Nothing can mitigate the brutality of the crime that they suffered. The only question is, **will their cries for justice be heard and will this jury sentence him to death for what he did to them** . . .
>
> Does the punishment fit the crime? What happened to Clarence and Arlene was excessive and brutal and horrible and deserves the death penalty. **They were given no chance to cry out for justice or cry out for help. This is their shot**. They deserve to have

the punishment fit the crime.

(Tr. 1012, 1027, 1053, Resp.App. A6, A21, A24).

"An argument is personalized only when it suggests a personal danger to the jury or their families. . . . Arguing for jurors to place themselves in the shoes of a party or victim is improper personalization that can 'only arouse fear in the jury.'" State v. Rhodes, 988 S.W.2d 521, 528 (Mo.banc 1999). Such an argument is improper because it encourages the jury to base its decision on fear, rather than reason. Id. at 529.

Here, the argument was not improper personalization. The argument did not ask the jurors to put themselves in the place of the Mennings as they suffered appellant's attack. The argument in no way suggested personal danger to the jurors. The argument did not arouse the passion of fear. Rather, the argument was simply an artful way of asking the jurors to impose the death penalty because it was a just sentence for the crimes of murdering the Mennings. Hall v. State, 16 S.W.3d 582, 585 (Mo.banc 2000) (where comment "did not directly ask any juror to put themselves or another identifiable person in the place of the victim or at the scene of the crime" to instill fear in the jury, "the argument was not improper personalization.").

Appellant also suggests that the argument was akin to admitting family member's opinions about the appropriate penalty (App.Br. 108). However, the prosecutor's argument did not constitute the admission of evidence that Clarence and Arlene Menning wanted appellant to be sentenced to death. Argument is not evidence, State v. Kenley, 952 S.W.2d 250, 270 (Mo.banc 1997), and, in any event, the prosecutor did not assert any ability to speak to the dead. The argument was simply a rhetorical way of stating that the death penalty was a just result for their murders. Therefore, appellant's claim has

no merit.

3. The argument did not misstate the law

Appellant, citing to seven pages of transcript, makes a vague claim that the state misstated the law by "repeatedly" arguing that the goal of sentencing was to do justice, and that the jury should ignore mitigating evidence (App.Br. 108). The only phrases of argument appellant cites in those pages are: "deserve what they got," and "a sign of a man who's building a case" (App.Br. 108).[9] Appellant thus puts respondent and this Court in the awkward position of trying to discover what he thinks is objectionable in those seven pages of transcript and make his argument for him, a task made even more difficult by the fact that there was only one objection at trial (App.Br. 108, n.8).

A reading of those seven pages of transcript shows that, when taken in context, the prosecutor's argument did not tell the jury to ignore the mitigating circumstances. Rather, the prosecutor argued that the mitigating circumstances were insufficient to outweigh the evidence in aggravation of punishment, which was the brutality of the murders themselves, and appellant's poor character. The prosecutor's statements that the case was not only about justice for appellant but also

[9] One of appellant's witnesses testified that appellant asked for a recommendation letter "to build a record on what he's doing there" (Tr. 953). Thus, the argument that appellant was building a case was drawn directly from the evidence.

about justice for the Mennings (Tr. 1012), that there were no "excuses" for appellant's behavior, and that "nothing could mitigate what happened" to the Mennings (Tr. 1013), that the jury should consider whether the Mennings "deserve[d] what they got" instead of focusing on whether or not Mrs. Burr had been faithful to appellant after she left him (Tr. 1018), that the case was about justice for the Mennings, not Mrs. Burr's behavior (Tr. 1019), that appellant's overall acceptable behavior in prison was a not proof of his good character but showed that he was "building a case" (Tr. 1054-55), did not ask the jury to disregard the law, but instead pointed out to the jury that appellant's evidence in mitigation of punishment was not sufficient to outweigh the evidence in aggravation of punishment. In fact, the prosecutor even explained the process to the jury (Tr. 1014-15), then argued all the evidence in support of the aggravating factors (Tr. 1015-22), then argued that the evidence as a whole warranted the death penalty (Tr. 1022-26), and then argued that there was nothing to mitigate the punishment of death (Tr. 1026-27). Clearly, the prosecutor asked the jury to follow the law, and argued that, under the law, the mitigating circumstances were insufficient to overcome the evidence in aggravation of punishment.

In State v. Storey, 40 S.W.3d at 910, in penalty phase closing argument the prosecutor characterized Storey's evidence in mitigation of punishment as "a laundry list of excuses." On appeal, Storey claimed that this argument encouraged the jury to ignore the law in sentencing him. Id. This Court denied his claim, stating:

> This point mischaracterizes the State's role in closing arguments. "The prosecutor may comment on the evidence and the credibility of the defendant's case. . . . Counsel may even belittle and point to the improbability and untruthfulness of specific evidence." . . . In this case, the State did not argue that the jury should disregard the evidence. The prosecutor simply

> argued that the jury should give the mitigating evidence little or no weight. . . . the State is free to argue that the evidence is not mitigating at all, so long as the trial court properly instructs the jury to consider all of the evidence in making its decision. The point is denied.

Id. at 910-11 (citations omitted).

Similarly, in the case at bar, the prosecutor did not argue that the jury should ignore the law. In fact, the prosecutor argued the entire process of imposing the death penalty, including the consideration of evidence in mitigation of punishment (Tr. 1014-15, 1026-27). The prosecutor simply argued that appellant's evidence in mitigation was not credible, and was insufficient to overcome the evidence in aggravation of punishment, including the circumstances of the murders, the brutality of the murders themselves, and appellant's poor character.

Appellant claims that this Court "condemned this argument" in State v. Storey, 901 S.W.2d 886, 902 (Mo.banc 1995). However, the argument in that trial was that the death penalty should be imposed based on one thing– the weighing of whose life is more valuable, the victim's or the defendant's. Id. In contrast, in the case at bar the prosecutor did not tell the jury to ignore the law, but rather told the jury to consider all the evidence in aggravation of punishment, and argued that the evidence in mitigation of punishment lacked credibility and was insufficient to outweigh the evidence in aggravation of punishment. *See* State v. Kenley, 952 S.W.2d at 270 (distinguishing Storey on grounds that prosecutor did not argue that the death penalty should be based solely on one thing). Therefore, appellant's reliance on this case is misplaced, and his claim has no merit.

4. The argument did not "improperly juxtapose" the rights of appellant and the Mennings

Appellant argues that the prosecutor "improperly juxtaposed the constitutional rights that [he] had with the rights that were denied the victims" (App.Br. 110).

The prosecutor's argument is set out below, the statements about which appellant complains are in boldface:

> On August 5th, 1996 the defendant, Kenneth Thompson, **took every right that Clarence and Arlene Menning ever had**. They were silenced forever. **They were given no opportunity to ask for mercy**. . . . Those are two crimes, and you are determining the punishment for those two crimes.
>
> That man took a father from his sons. **Clarence Menning had no chance to ask for mercy. Kenneth Thompson was his judge, his jury, and his executioner**. That man took a mother from her children. **He was her judge, jury, and executioner. What chance did she have to ask for mercy?**
>
> Punishment must fit the crime. That's what this case is about. . . .
>
> Does the punishment fit the crime? What happened to Clarence and Arlene was excessive and brutal and horrible and deserves the death penalty. **They were given no chance to cry out for justice or cry out for help**. This is their shot. They deserve to have the punishment fit the crime.

(Tr. 1012, 1052-53).

A similar claim was raised in State v. Hall, 955 S.W.2d 198, 209 (Mo.banc 1997). In that case, the prosecutor argued that the victim "did not have a lawyer on that bridge asking for mercy from twelve people." Id. On appeal, the Hall claimed this argument implied that it was unjust for Hall to

assert his constitutional rights. Id. This Court denied the claim, finding that the statement, read in context, "highlights the nature and seriousness of the crime" and Hall's "disregard for the law," and was not improper. Id., *see also* Antwine v. State, 791 S.W.2d 403, 410 (Mo.banc 1990) (argument that Antwine believed in execution without a judge, jury, or counsel did not punish him for exercising his constitutional rights).

Accordingly, in the case at bar, the prosecutor's argument did not tell the jury to "punish" appellant for exercising his rights. Rather, it argued the circumstances of the crimes, including that appellant murdered them without provocation, beginning his assault while they were asleep in their own bed. This argument was permissible, and the trial court did not plainly err in not sua sponte striking it. Therefore, appellant's claim has no merit, and must fail.

VIII.

The trial court did not abuse its discretion in sustaining the prosecutor's motion to strike venireperson Mathews for cause because she was not qualified to serve as a juror in that her views on the death penalty would have substantially impaired her performance as a juror as shown by her consistent statements that she doubted she could realistically consider the death penalty, and by her unequivocal statements that her personal and religious beliefs might prevent her from imposing the death penalty in any situation.

For his eighth point on appeal, appellant claims that the trial court abused its discretion in striking venireperson Mathews for cause (App.Br. 111).

1. Facts

At trial, the prosecutor asked whether anyone had personal views that would prevent them from realistically considering imposing a death verdict (Tr. 161). Ms. Mathews responded, stating that she doubted she could make the decision, even with eleven other jurors (Tr. 161-62). The prosecutor asked whether she could sign a death verdict, and she answered, "I think I would have difficulty with that decision" (Tr. 163). She said if all the other jurors were convinced about imposing the death penalty, she "might go along," but her conscience would not "be where [she] would want it to be on that" (Tr. 163). The prosecutor asked if that was because of her "religious or personal beliefs," and Ms. Mathews said, "Both" (Tr. 163). Then the following exchange took place:

MS. SMITH: And those might prevent you from being able to realistically vote for the death penalty in any situation?

JUROR MATHEWS: Yes.

(Tr. 163). She said that she did not think there was anything the prosecutor could say to make her change her mind (Tr. 163-64).

Appellant attempted to rehabilitate her, but all she said was that she could follow the process of considering the death penalty, but when it came down to the last step of actually imposing the sentence, she doubted that she could (Tr. 188-90). After repeated questioning by appellant, she said, "My concern is that you understand that there's a doubt there, and I'm being sincere about that. . . . I'm just saying I need to voice that doubt because that's a very powerful decision." (Tr. 190-91).

The state challenged Ms. Mathews for cause, and the trial court sustained the strike (Tr. 193-94).

2. Standard of review

"The trial court is in the best position to evaluate a venireperson's commitment to follow the law and is vested with broad discretion in determining the qualifications of prospective jurors." State v. Middleton, 995 S.W.2d 443, 460 (Mo.banc 1999). "A trial court's 'ruling on a challenge for cause will not be disturbed on appeal unless it is clearly against the evidence and constitutes a clear abuse of discretion.'" Id., *quoting* State v. Kreutzer, 928 S.W.2d 854, 866 (Mo.banc 1996).

3. Law on striking venirepersons for cause

"Venirepersons may be excluded from the jury when their views would prevent or substantially impair their ability to perform their duties as jurors in accordance with the court's instructions and their oath." State v. Middleton, 995 S.W.2d at 460, Wainwright v. Witt, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985). "The qualifications of a prospective juror are not determined conclusively by a single response, but by the entire examination." State v. Johnson, 22 S.W.3d 183,

188 (Mo.banc 2000).

> What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with a definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . . This is why deference must be paid to the trial judge who sees and hears the juror.

Wainwright v. Witt, 469 U.S. at 424-26, 105 S.Ct. at 852-53; State v. McMillin, 783 S.W.2d 82, 91 (Mo.banc 1990). The trial court, not the venireperson, determines whether a challenged member of a panel could be an impartial juror, although testimony from the venireperson is evidence on this issue. State v. Walton, 796 S.W.2d 374, 377-78 (Mo.banc 1988). When a trial court is faced with contradictory responses by a venireperson, the trial court is not required to accept the responses favorable to the defendant, and is well-within its discretion in striking the venireperson for cause. State v. Ringo, 30 S.W.3d 811, 817-18 (Mo.banc 2000); State v. Kinder, 942 S.W.2d 313, 324-25 (Mo.banc 1996).

In State v. Storey, 40 S.W.3d 898, 905 (Mo.banc 2001), the venireperson stated that her moral and religious beliefs would not allow her to impose the death penalty, and then said that she possibly might be able to, in a severe case. The trial court sustained the strike for cause, which decision Storey appealed. Id. This Court denied the point, stating, "the venireperson's equivocal and shifting

responses to questions focusing on his ability to impose the death penalty provide a sufficient basis for the trial court to conclude that the venireperson could not consider the full range of punishment as required by the instructions and the juror's oath."

4. Venireperson Mathews was properly struck

As shown above, Ms. Mathews responded when the prosecutor asked if anyone had views that would prevent them from realistically considering the death penalty, she said she doubted she could make that decision, even with eleven other jurors, and she said that if she were the foreperson, she might be able to sign a death verdict if all the evidence and all eleven other jurors wanted to, but it would trouble her conscience to do so (Tr. 161-63). She unequivocally stated her personal and religious beliefs might prevent her from realistically considering the death penalty in any situation (Tr. 163). When appellant attempted to rehabilitate her, she stated that she could follow the process, but that she had sincere doubts about whether she could take the final step and impose death (Tr. 188-91).

These responses indicate more than just an acknowledgment of the seriousness of the death penalty, they demonstrate that Ms. Mathews's views on the death penalty would have substantially impaired her ability to follow the court's instructions and realistically consider the full range of punishment for appellant. Thus, the trial court did not abuse its discretion in sustaining the prosecutor's strike for cause of Ms. Mathews, and appellant's point must fail.

IX.

The trial court did not err in submitting the aggravating circumstance that the murder was committed while appellant was engaged in the perpetration of rape to the fact finder because the submission did not violate double jeopardy in that the failure of the first jury to find this circumstance was not an "acquittal." In any event, appellant was not prejudiced.

For his ninth point on appeal, appellant claims that the trial court erred in submitting to the fact finder the statutory aggravating circumstance that he committed the murder while he was engaged in the perpetration of rape because this violated double jeopardy in that the first jury did not find this aggravating circumstance (App.Br. 116). Appellant acknowledges that the very point he raises now has already been rejected by this Court in State v. Storey, 40 S.W.3d 898, 915 (Mo.banc 2001) (App.Br. 119).

1. Facts

During appellant's first trial, the prosecutor submitted three aggravating circumstances for each count of murder, including that each murder was committed while appellant was engaged in the perpetration of rape (1st L.F. 579, 585). The jury found two aggravating circumstances for each murder, neither of which was the rape aggravating circumstance (1st Tr. 1667-69).

During the retrial, the prosecutor again submitted three aggravating circumstances for each count of murder, including the rape aggravating circumstance (L.F. 245-46, 252-53). The jury hung on the death penalty, and one of the two aggravating circumstances found by the judge was the rape aggravating circumstance (Tr. 1080, L.F. 266-67).

2. Standard of review

A claim of trial court error on grounds of double jeopardy is reviewed for error. *See* State v. Storey, 40 S.W.3d at 915.

3. There was no acquittal

In Storey, this Court rejected a claim that the trial court violated double jeopardy by submitting a statutory aggravating circumstance to a jury on retrial, when prior juries had not found that circumstance. Id. at 914-15. This Court found that the claim was "squarely rejected" in Poland v. Arizona, 476 U.S. 147, 155-56, 106 S. Ct. 1749, 90 L.Ed.2d 123 (1986). Id. This Court also examined Jones v. United States, 526 U.S. 227, 119 S.Ct. 1213, 143 L. Ed. 2d 311 (1999), and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and found that both of these cases also rejected that argument. Id.

Thus, under this Court's and United States Supreme Court precedent, appellant's point has no merit.

Appellant claims that, "in light of recent developments in the law," this Court should reconsider its holding in Storey (App.Br. 119). However, the two cases appellant cites in support of his claim are Jones and Apprendi, both of which were addressed in Storey. Nothing in appellant's brief shows that Storey was decided incorrectly. Therefore, appellant's point must fail.

4. In any event, appellant was not prejudiced

Statutory aggravating circumstances are only used to determine whether a defendant is eligible for the death penalty. State v. Worthington, 8 S.W.3d 83, 88 (Mo.banc 1999). The fact-finder need only find one aggravating circumstance to proceed to the next step, determining whether to select the defendant for the death penalty. Id. At that point, the fact-finder no longer considers individual

statutory aggravating circumstances, but considers all the evidence as a whole. Id. Thus, as long as the fact-finder correctly finds the existence of one statutory aggravating circumstance, the sentence of death will be upheld. Id.

Accordingly, appellant could not be prejudiced, even if the submission of the rape aggravating circumstance was in error, because the trial court properly found another statutory aggravating circumstance. Therefore, his point must fail.

X.

The trial court did not plainly err in not, sua sponte, declaring unconstitutional § 565.030.4(4), RSMo 2000, which permits the judge to determine the sentence if the jury cannot agree upon punishment, because Apprendi v. New Jersey, by its express terms, does not apply to capital sentencing.

For his tenth point on appeal, appellant claims that under Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 145 (2000), § 565.030.4(4), RSMo 2000, which allows the judge to determine the sentence if the jury cannot agree upon punishment, is unconstitutional (App.Br. 123, 127). Appellant argues that Missouri really has both crimes of first degree and capital murder, which requires the state to name the offense as capital murder and list all possible aggravating circumstances in the charging document, and requires that only a jury may find statutory aggravating circumstances (App.Br. 124-27).

1. Standard of review

Appellant did not raise his constitutional claim at the first opportunity; he raises it for the first time on appeal. Therefore, his claim is reviewable, if at all, for plain error only. State v. Parker, 886 S.W.2d 908, 925 (Mo.banc 1994).

2. Section 565.030.4(4), RSMo 2000, is constitutional

In State v. Cole, No. SC83485 (Mo.banc February 26, 2002), this Court rejected the claim appellant raises now. In that case, Cole claimed that, under Apprendi, the crime of first degree murder was really two crimes of "regular" first degree murder and capital murder. Id., slip op. at 7. This Court held:

> Appellant's claim is meritless. Section 565.020 defines a single offense of first- degree murder with the express range of punishment including life imprisonment or death. Section 565.030 delineating trial procedure in cases of first-degree murder does not create, or differentiate, two separate categories of first-degree murder offenses. The maximum penalty for first-degree murder in Missouri is death, and the required presence of aggravating facts or circumstances to result in this sentence in no way increases this maximum penalty. Apprendi is inapposite.

Id., slip op. at 7-8.

Thus, under this Court's precedent, there is no merit to appellant's claim that there are really two types of first-degree murder in Missouri. Moreover, the United States Supreme Court expressly stated in Apprendi that its holding did not prevent judges from separately determining the presence or absence of statutory aggravating circumstances in a capital case, after a jury verdict of guilt, because the "prescribed statutory maximum" for a capital offense was already death. Apprendi v. New Jersey, 530 U.S. at 496-97. Therefore, there is no merit to either his claim that the charging documents were defective or that a judge is never allowed to find aggravating circumstances, and his point must fail.

XI.

The trial court did not err in overruling appellant's objection to the verdict mechanics instructions, Instructions 10 and 15, because these instructions, which followed MAI-CR 3d 313.48A, did not mislead the jury in that the instructions did not purport to instruct on all the steps of the capital sentencing process, and the jury was separately instructed that it must find that the aggravating evidence outweighed the mitigating evidence before it could assess a death sentence.

For his eleventh point on appeal, appellant claims that the trial court erred in submitting Instructions 10 and 15 to the jury, arguing that the instructions omitted the "third step" of the process of assessing a death sentence (App.Br. 128). This Court rejected appellant's claim in State v. Storey, 40 S.W.3d 898, 912 (Mo.banc 2001), and in State v. Cole, No. SC83485 (Mo.banc February 26, 2002), slip op. at 16-17.

1. Legal background

In Missouri, capital sentencing is a four-step process. Section 565.030.4, RSMo 2000. The jury is instructed on each of these four steps by a separate MAI-CR instruction form. The first step, finding at least statutory aggravating circumstance, § 565.030.4(1), is provided by MAI-CR 3d 313.40. The second step, finding that evidence in aggravation of punishment warrants a sentence of death, § 565.030.4(2), is provided by MAI-CR 3d 313.41A. The third step, finding that evidence in aggravation of punishment outweighs evidence in mitigation of punishment, § 565.030.4(3), is provided by MAI-CR 3d 313.44A. The fourth step, deciding whether to impose the death sentence ("life option"), § 565.030.4(4), is provided by MAI-CR 3d 313.46A. An instruction describing each of

these four steps for each count was submitted to the jury at appellant's trial (L.F. 245-49, 252-56).

The verdict mechanics instruction, MAI-CR 3d 313.48A, explains to the jury how to fill out the punishment-phase verdict forms. At appellant's trial, the verdict mechanics instruction, Instruction 10, read as follows:

> When you retire to your jury room, you will first select one of your number to act as your foreperson and to preside over your deliberations.
>
> You will be provided with forms of verdict for your convenience. You cannot return any verdict imposing a sentence of death unless all twelve jurors concur in and agree to it, but any such verdict should be signed by your foreperson alone.
>
> As to Count I, if you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Clarence Menning, your foreperson must write into your verdict all of the statutory aggravating circumstances submitted in Instruction No. 6 which you found beyond a reasonable doubt, and sign the verdict form so fixing the punishment.
>
> If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Clarence Menning by imprisonment for life by the Department fo Corrections without eligibility for probation or parole, your foreperson will sign the verdict form so fixing the punishment.
>
> If you are unable to unanimously find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt, as submitted in Instruction No. 6, or if you are unable to unanimously find that there are facts and circumstances in aggravation of punishment which

warrant the imposition of a sentence of death, as submitted in Instruction No. 7, then your foreperson must sign the verdict form fixing the punishment at imprisonment for life by the Department of Corrections without eligibility for probation or parole.

If you do unanimously find the matters described in Instructions No. 6 and 7, but are unable to agree upon the punishment, your foreperson will sign the verdict form stating that you are unable to decide or agree upon the punishment. In such case, the Court will fix the defendant's punishment at death or at imprisonment for life by the Department of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of the jury to fix the punishment.

When you have concluded your deliberations you will complete the applicable forms to which all twelve jurors agree and return them with all unused forms and the written instructions of the Court.

(L.F. 250-51, Resp.App. A2-A3). Instruction 15 was substantially the same as Instruction 10 except that it addressed the murder of Arlene Menning (L.F. 257-58, Resp.App. A4-A5).

2. Standard of review

A claim of trial court error on grounds of improperly instructing the jury is reviewed for error. *See* State v. Storey, 40 S.W.3d at 914.

3. Instructions 10 and 15, the verdict mechanics instructions, were proper.

The jury could only reach Instructions 10 and 15 after having completed the four-step process for determining whether to impose the death penalty. Instructions 8 and 13 explained to the jurors that if they all found that the evidence in mitigation of punishment outweighed the evidence in aggravation of

punishment, they must impose a sentence of life imprisonment (L.F. 248, 255).

The fifth paragraph of Instructions 10 and 15 informed the jury that if it was unable to agree on either of the first two steps, it must return a verdict of life imprisonment. The sixth paragraph of Instructions 10 and 15 informed the jury that if it was unable to agree on punishment after the first two steps, it must return a verdict stating it was unable to agree on punishment. Because it does not matter on which step the jury is unable to agree after the first two steps, the instructions submitting the third and fourth steps are not specifically cross-referenced in the verdict mechanics instruction.

Appellant argues, however, that not specifically cross-referencing the third step in the process in the verdict mechanics instruction "created a substantial likelihood that the jury failed to consider all relevant mitigating facts and circumstances" (App.Br. 133). Appellant's argument ignores the fact that the instruction was not a verdict director, it was a verdict mechanics instruction– it did not try to summarize the elements of proof required to impose death, it merely told the jurors how to fill out the forms after they had already applied the law. Further, appellant's argument ignores the well-settled law that an instruction is not read in isolation, but must be read as a whole to determine whether error occurred. State v. Storey, 40 S.W.3d at 912.

Appellant recognizes that this Court rejected his argument in Storey (App.Br. 132). This Court has also recently rejected the same argument in State v. Cole, No. SC83485, slip op. at 16-17. Appellant attempts to analogize his case to Carter v. Bowersox, 265 F.3d 705 (8th Cir. 2001), but in that case, the court failed to give the verdict director for the second step of the process. In contrast, in appellant's case, the court properly instructed the jury on all four steps of the process (L.F. 245-49, 252-56). Therefore, appellant's reliance on Carter is misplaced, and his point must fail.

XII.

In the exercise of its independent statutory review, this Court should affirm appellant's sentence of death because 1) the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, 2) the evidence supports the trial court's finding of a statutory aggravating circumstance, and 3) the sentence is not disproportionate to the penalty imposed in similar cases, considering the crime, strength of the evidence, and the appellant.

For his twelfth point on appeal, appellant seeks independent review of his sentence (App.Br. 134).

1. Standard of review

Under § 565.035.3, RSMo 2000, this Court must independently review the sentence of death and determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in subsection 2 of section 565.032 and any other circumstance found;
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant.

2. The sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor

There is no evidence that the trial court imposed the sentence of death under the influence of passion, prejudice, or any other arbitrary factor. Appellant claims that the lack of a verdict on life without probation or parole somehow made the judge's verdict arbitrary, and that the admission of photographs, State's Exhibit 89, and the prosecutor's argument had the same effect (App.Br. 135-36). However, judges are presumed not to consider improper evidence during sentencing. State v. Smith, 32 S.W.3d 532, 555 (Mo.banc 2000). Appellant has presented no evidence or argument to counter this presumption. The time lapse between the end of trial and the judge's return of a verdict of death, two-and-a-half months (Tr. 932, 1079), demonstrates that this was no hasty decision by the judge.

Appellant seems to argue that, in applying its proportionality review, this Court should speculate about what caused the jury to return its decision that it could not agree on punishment (App.Br. 135-36). However, by the express terms of the statute, in carrying out its independent review, this Court considers whether the sentence of death was imposed under the influence of an inappropriate factor. Section 565.035.3(1), RSMo 2000. Here, as shown in Respondent's Point I, the judge, not the jury, imposed the sentence of death; the only valid verdict the jury returned was that it could not agree upon punishment. Therefore, the statutorily mandated proportionality review must focus on the trial court's imposition of the sentence of death. As shown by the preceding paragraph, there is no evidence that the trial court's sentence of death was made under the influence of passion, prejudice, or any other arbitrary factor.

3. The evidence supports the judge's finding of a statutory aggravating circumstance

The judge found two statutory aggravating circumstances for each murder (Tr. 1080). These were that the murder was committed while appellant was engaged in the murder of another victim,

§ 565.032.2(2), RSMo 2000, and that the murder was committed while appellant was engaged in the perpetration of rape, § 565.032.2(11), RSMo 2000 (Tr. 1080).

As shown by Respondent's Statement of Facts, there was ample evidence to support each finding. Appellant's confession, the physical evidence from the crime scene and the automobiles appellant drove, and the autopsy results, (Tr. 441-57, 484-530, 662-63, 777-82), provided ample evidence to support a finding beyond a reasonable doubt that appellant went into the Mennings's bedroom and murdered both of them by beating their heads with an axe maul handle. Ms. Burr's testimony that appellant ripped her panties off and raped her at gun point, appellant's confession that he killed the Mennings so that he could rape Ms. Burr without them trying to stop him, plus the physical evidence of Ms. Burr's torn panties on the bed and the gun police found in appellant's car (Tr. 264-67, 456-57, 662-65, 702), provide ample evidence to support a finding beyond a reasonable doubt that appellant committed the murders while engaged in the perpetration of rape.

Thus, the evidence was sufficient to support the judge's finding of a statutory aggravating circumstance.

4. The sentence of death is not excessive or disproportionate

The sentence of death is not disproportionate considering (A) the crime, (B) the strength of the evidence, and (C) the appellant.

A. The crime is similar to other cases in which the death penalty has been imposed

The evidence established that appellant killed Mr. and Mrs. Menning by beating their heads with an axe maul handle, and that he killed them so it would be easy to rape Ms. Burr (*see* Respondent's Statement of Facts). This case is like other death penalty cases where the defendant murdered an

elderly person in his or her home, State v. Roberts, 948 S.W.2d 577, 607 (Mo.banc 1997); State v. Barnett, 980 S.W.2d 297, 310 (Mo.banc 1998); committed multiple homicides, State v. Middleton, 998 S.W.2d 520, 531 (Mo.banc 1999); State v. Winfield, 5 S.W.3d 505, 516-17 (Mo.banc 1999); State v. Johnson, 22 S.W.3d 183, 193 (Mo.banc 2000), and where the defendant committed the murder while engaged in perpetration of rape, State v. Worthington, 8 S.W.3d 83, 94 (Mo.banc 1999); State v. Link, 25 S.W.3d 136, 150 (Mo.banc 2000); State v. Ferguson, 20 S.W.3d 485, 511 (Mo.banc 2000).

B. The evidence establishing appellant's guilt was overwhelming

Ms. Burr's testimony was that when she went to bed on August 4, her parents were alive, that in the early morning hours of August 5, she heard a thumping noise, that appellant came into her room naked and raped her at gunpoint, that he kidnapped her and her children, and that appellant told her that he had killed her parents (Tr. 264-75). Appellant confessed to going to the house, killing the Mennings, raping Ms. Burr (Tr. 661-65). The physical evidence, including the Menning's bodies, the various items appellant took to the house, the torn panties on Ms. Burr's bed, and the gun, corroborated Ms. Burr's statement and appellant's confession (Tr. 441-57, 484-530, 662-63, 777-82). The physical evidence, appellant's confession, and Ms. Burr's testimony are overwhelming evidence of appellant's guilt of these murders.

C. A consideration of the nature of appellant shows that the death penalty is not excessive or disproportionate

Appellant's escape from jail shows his nature. He behaved appropriately in jail, and even told an officer that he had no intention of escaping (Tr. 570, 751-52), but in reality he was just waiting for

the opportunity. He even told another person that, if given the opportunity, he would escape again (Tr. 735). In Potosi, appellant worked many jobs that allowed him access to many parts of the prison restricted to other prisoners, including working in the laundry, the kitchens, in the metal shop, and on the hazardous materials team, violated the procedures on a routine count, and stole food from an area to which he was not allowed access (Tr. 822-23, 851, 873-74, 889, 936, 941-42). These behaviors, in addition to his successful escape and his statements that he would escape again if he could, show that appellant is still an escape risk.

The circumstances of the crime show appellant's nature. The Mennings did nothing to provoke appellant's attack; they had been asleep in bed at the time appellant began beating them (Tr. 643-44, 661-62). He went to the trailer that night with a plan to kill the Mennings, rape and then kill Ms. Burr, kidnap her children, burn the trailer, and flee, as shown by his practicing shooting a gun hours before the murders, parking 561 feet from the house and taking several trips back and forth to bring incendiary materials, weapons, and binding materials to the house (Tr. 439, 660-61), by his beating the Mennings in the head repeatedly and with such force that it caused open wounds and fractures of the type normally only seen in car accidents or falls from a great height (Tr. 779, 781), that he told police he was going to have sex with Ms. Burr "one last time" (Tr. 663), and that he did not kill her after he raped her because he thought she "was not resisting" him raping her (Tr. 664). Also, appellant stated that he raped Ms. Burr because he knew she had been raped as a child, and being raped was her worst fear (Tr. 665).

Thus, a consideration of the nature of appellant shows that the death penalty is not excessive or disproportionate, and appellant's point has no merit.

CONCLUSION

In view of the foregoing, respondent submits that appellant's sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 26,400 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 1st day of April, 2002, to:

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APPENDIX